IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1631

LEONARD BERLIN,

Petitioner,

vs.

GILBERT NATHAN, HARRIET NATHAN, FRED BENJAMIN and STUART SHAPIRO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Miscellaneous

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To the Justices of the Supreme Court of the United States:

Petitioner, Leonard Berlin, respectfully prays that a Writ of Certiorari issue to review the decision and order of the Illinois Supreme Court[1] denying review of the

[1] The reasons for directing the Writ to the Illinois Supreme Court, as opposed to a lower court, are set forth at pages 5-6 below. Alternatively, if the Court deems it more appropriate that the Writ be directed instead to the Illinois Appellate Court, it is requested that this Petition be so read.

judgment and opinion of the Illinois Appellate Court, First Judicial District, reversing a judgment in his favor by the Circuit Court of Cook County, Illinois upon a jury verdict.

The Petitioner, a Board-certified Radiologist, had been the object of a $125,000 malpractice suit brought by Harriet Nathan for alleged negligent diagnosis and treatment of an injury to her little finger. In a separate action, Petitioner Berlin countersued against Nathan and her attorneys, alleging, *inter alia*, that the Nathan suit was groundless and wilfully and wantonly brought with reckless disregard as to the truth or falsity of the allegations. Upon trial, the jury specifically found that the Respondents had brought the suit in a wilful and wanton manner, without probable cause to believe that any of the allegations against Petitioner had any substance in fact. It awarded Petitioner $2,000 actual and $6,000 punitive damages.

The Illinois Appellate Court, First Judicial District, reversed the judgment, holding that the Petitioner had not met Illinois' restrictive criteria for the ancient form of action of Malicious Prosecution, including the necessity for a showing of "special injury."[2]

Petitioner then petitioned the Illinois Supreme Court for leave to appeal, contending, *inter alia*, that the

[2] "Special injuries" have been defined in Illinois decisions based on ancient common law criteria, as consisting of injury of a highly unusual and distinctive nature, such as seizure of goods by writ of attachment (*Larence v. Hagerman*, 56 Ill. 68 (1870), and bodily arrest (*Cripe v. Pevely Dairy Co.*, 275 Ill.App. 231 (1934)). Intervening decisions of this Court in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969), and *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972) have largely eradicated those few procedures wherein "special injury" could be said to be present in a court case.

Illinois Appellate Court's decision, by adhering to these outmoded and unworkable standards of pleading and proof, effectively deprived him of access to the courts to redress his actual and proven injury, in violation of his Constitutional rights under the Fourteenth Amendment of the Constitution of the United States. He further contended that such appeal was as of right to the Illinois Supreme Court, since under that Court's own rules, Federal Constitutional issues which first emerge by reason of a decision of the Illinois Appellate Court *must* be reviewed by the Illinois Supreme Court. That Court denied the Petitioner's request for leave to appeal, necessarily rejecting Petitioner's claim that Federal Constitutional issues had arisen. Petitioner's Petition for Reconsideration, reasserting these same contentions, was similarly denied.

OPINIONS BELOW

The Opinion of the Illinois Appellate Court, First Judicial District, rendered on September 14, 1978, is reported at 64 Ill.App.3d 940, 381 N.E.2d 1367 (1978). That Opinion is reproduced as Appendix A to this Petition. The Illinois Supreme Court rendered no opinion in refusing to grant Petitioner's Petition for Leave to Appeal. Likewise, no opinion accompanied its denial of Petitioner's Petition for Reconsideration. The aforesaid Orders of the Illinois Supreme Court are attached hereto as Appendix Exhibits B and C, respectively.

JURISDICTION

The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal on January 25, 1979. It denied Petitioner's Petition for Reconsideration on March 12, 1979. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Illinois Supreme Court erred in failing to identify and consider, in conformity with its own rules, substantial questions of due process and equal protection under the Fourteenth Amendment which emerged as a result of the Illinois Appellate Court's reversal of the trial court judgment and damage award based on special jury findings that Respondents had wilfully and wantonly brought a groundless lawsuit against Petitioner, to his resultant injury?

2. Whether the granting of immunity to attorneys and litigants from having to respond in damages for bringing wilful, wanton and groundless (as opposed to merely negligent) lawsuits, to the injury of others, violates the victim's right of access to the courts, as guaranteed by the due process and equal protection provisions of the Fourteenth Amendment?

NATURE OF THE RELIEF SOUGHT

While Petitioner will show that the Illinois Appellate Court's decision effectively deprived him and persons similarly situated of meaningful access to the courts to redress injury in violation of Federal Constitutional standards, no direct review and reversal of that decision is sought herein. The Supreme Court is not asked at this time to rule definitively concerning the Constitutional adequacy of Illinois' tort law, nor is it asked to affirmatively refashion a new Illinois remedy which will pass Constitutional muster. Rather, the sole objective of this Petition is to correct the Illinois Supreme Court's erroneous refusal to identify substantial Federal Constitutional questions which necessarily arose when the Appellate Court reversed the judgment that had been awarded to Dr. Berlin and to cause the Illinois Supreme Court to determine whether Illinois law affords a remedy in the circumstances of this case meeting Federal requirements of due process and equal protection. *Cf. Case v. Nebraska*, 381 U.S. 336, 81 S.Ct. 1486 (1965).

Since, as we will show below, the case *does* implicate serious Federal Constitutional questions, it was not only the right but the duty of the Illinois Supreme Court to hear and consider those issues in a review of the Appellate Court's decision.[3] This Honorable Court is the final arbiter in determining the presence or absence of such federal issues and it should remand the case to the

[3] The inescapable Fourteenth Amendment considerations of due process and equal protection were unambiguously presented by Petitioner to the Illinois Supreme Court in his Petition for Leave to Appeal, and in his Petition for Reconsideration. In his Petition for Leave to Appeal, Petitioner stated, in pertinent part:

(Footnote continued on following page)

Supreme Court of Illinois, with instructions to properly hear and consider those issues in accordance with its jurisdictional duty;[4] also, to determine whether Illinois

[3] *continued*

"In reversing the jury verdict and trial court judgment, the Appellate Court erroneously deprived Plaintiff of due process of law as guaranteed . . . by the Fourteenth Amendment to the United States Constitution" (Petition for Leave to Appeal, at 4).

It was further stated as follows:

"By holding that the Plaintiff has not stated a cause of action, the Appellate Court has deprived him of due process of law and has granted immunity to lawyers and litigants which is not sanctioned by the law."

* * * *

"To deny relief is to deny litigants the same rights which are granted to others similarly harmed." (Petition for Leave to Appeal, at 27, 28)

[4] It is indisputably the duty of the Illinois Supreme Court, under its own rules and Illinois Constitutional provisions, to hear and consider Federal Constitutional questions which emerge as a result of action taken by the Appellate Court. Rule 317 of the Illinois Supreme Court Rules, Ill.Rev.Stat.Ch. 110A, § 317 provides, in pertinent part, that "appeals from the Appellate Court shall lie to the Supreme Court [Illinois] as a matter of right in cases in which a question under the Constitution of the United States . . . arises for the first time in and as a result of the action of the Appellate Court." Similarly, Article VI, § 4(c) of the Illinois Constitution of 1970, provides in pertinent part:

"Appeals from the Appellate Court to the Supreme Court are a matter of right *if a question under the Constitution of the United States . . . arises for the first time in and as a result of the action of the Appellate Court . . .* " (Emphasis added)

These cited provisions are not merely matters of state law which superficially might be viewed as outside of the cognizance of the United States Supreme Court; rather, they are imbued with a Federal Constitutional aspect which under the Supremacy Clause, Article VI of the U.S. Constitution, cannot be left solely and finally to a state tribunal. The inquiry posed by these provisions necessarily involves issues which are ultimately the province of this Court. *Claflin v. Houseman*, 93 U.S. 130 (1876); *Second Employers Liability Cases*, 223 U.S. 1 (1912); and *Testa v. Katt*, 330 U.S. 386 (1947).

law affords, in the circumstances of the instant case, a judicial remedy meeting at least the minimum requirements of due process and equal protection.

STATEMENT OF FACTS

Dr. Leonard Berlin is a Board-certified Radiologist. In October, 1973, Dr. Berlin reviewed and interpreted x-rays taken of Harriet Nathan's dislocated finger. Mrs. Nathan was thereafter treated by other doctors.

Some months later, Gilbert Nathan, Harriet's husband, and a practicing attorney, informed Petitioner in a telephone call that he was going to bring a malpractice suit against one of the physicians who had treated his wife and that Petitioner would also be named a defendant.

Just short of two years after the injury, the Defendant-Respondents, Fred Benjamin and Stuart Shapiro, attorneys, filed a medical malpractice suit in the Circuit Court of Cook County naming Dr. Berlin, Dr. William Meltzer and Skokie Valley Community Hospital defendants, charging each of them with medical malpractice (sometimes herein referred to as the "Nathan case"). Prior to the preparation of the filing of that suit, the attorneys did not communicate in any way with any of the doctors who had treated Mrs. Nathan, nor did they attempt to do so. At the trial of this cause, Fred Benjamin, the attorney actively prosecuting Mrs. Nathan's suit, admitted that he had no evidence or information to support the allegations of medical malpractice which were made against Dr. Berlin in

Mrs. Nathan's complaint which he had drafted and filed. Likewise, Mrs. Nathan admitted that in consultation with her subsequently engaged physicians, there was no intimation that Dr. Berlin's services to her had in any sense been improper.

On October 22, 1975, shortly after the filing of the suit against him, Dr. Berlin filed suit in the Circuit Court of Cook County against Respondents. His suit was consolidated with Mrs. Nathan's medical malpractice suit by the Circuit Court. On the date set for trial, Harriet Nathan voluntarily dismissed her medical negligence suit against all defendants. The cause proceeded to trial on Dr. Berlin's amended complaint before a jury. At the conclusion of the evidence, the jury returned a verdict in favor of Dr. Berlin, awarding him Two Thousand Dollars ($2,000) actual damages and Six Thousand Dollars ($6,000) punitive damages. Also, the jury returned answers to special interrogatories finding that each of the defendants had been guilty of wilful and wanton conduct and without any reasonable or probable cause in filing their suit against Dr. Berlin.

On appeal, the Appellate Court of Illinois reversed. It held that the proper course of action which a wrongfully sued person must follow in Illinois to redress any injuries which he may have suffered as a result of such a lawsuit is under the common law action of Malicious Prosecution. It made no reference whatsoever to the facts adduced at the trial, but relied solely on the pleadings in the suit, holding that Dr. Berlin had not stated a cause of action. The Appellate Court held that in order to plead such a cause of action it must be alleged, in Illinois, (a) that the plaintiff in the prior suit had acted maliciously and without probable cause, (b) that the prior suit had terminated in favor of the

defendant therein (that is, the plaintiff in the subsequent action such as the case at bar), and (c) that the latter must be shown to have suffered "special injury" of a kind not necessarily found in any and all suits prosecuted to recover for like causes of action. Applying these highly restrictive and ancient common law standards, the Appellate Court held that Dr. Berlin had failed to plead that the prior cause had terminated in his favor (since instead it had been dismissed by Mrs. Nathan) or to plead that he had suffered "special injury." Such special injury was defined by the Appellate Court to include arrest of the person, seizure of his property and other elements and events scarcely capable of occurrence and proof in modern life. Notwithstanding the fact that Petitioner had pleaded that Respondents had charged and alleged in their complaint professional malpractice against him "with reckless disregard as to [their] truth or falsity", the Appellate Court held that such pleading was not sufficient to allege "malice."[5]

Petitioner filed his Petition for Leave to Appeal to the Illinois Supreme Court. That Court's denial of the said Petition, and of reconsideration, as set forth above, then followed.

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[5] This holding is obviously contrary to the definition of malice employed by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964). Most recently, this Court has reaffirmed that malice has long been recognized to include an improper purpose, including "the [lack of] belief of the defendant in the truth of his statement, or upon the ill will which the defendant might have borne towards the defendant." *Herbert v. Lando*, ... U.S. ..... , ... S.Ct. ..... , 47 U.S. Law Week 4401, 4403 (1979).

REASONS FOR GRANTING THE WRIT

I.

BURGEONING FRIVOLOUS LITIGATION COMPELS THIS COURT'S CORRECTIVE INTERVENTION.

This case presents a question which goes to the very heart of our judicial system. The Petitioner proved to the satisfaction of a jury that the suit charging him with medical malpractice had been brought in a wilful and wanton manner without any reason or probable cause to believe that he had been guilty of the grave professional charges made against him. The effect of the decision by the Illinois Appellate Court, reversing the trial court judgment, is virtually to grant total immunity to all attorneys and litigants who commence legal proceedings no matter how irresponsible, frivolous or malicious they may be in their motivation and pleading. The Illinois Supreme Court, in refusing to grant Petitioner's Petition for Leave to Appeal, failed to recognize that the Appellate Court decision, measured in the context of present-day conditions, called into serious question Petitioner's Federal Constitutional right to court access as a matter of due process and equal protection of the laws.

As matters now stand, Petitioner has been deprived of any meaningful access to the Illinois courts. The decision of the Appellate Court sets attorneys and litigants in a separate category, apart from all others. It grants them as officers of the court immunity from any answerability for intentionally and recklessly inflicting injury upon another simply because they have done so under the mantle of "judicial process." Ironically, victims of such misconduct, like Dr. Berlin, are *denied* effective access

to the same Courts in which the wrong occurred, all in the name of upholding principles of open access to litigation!

In this Age of Litigation the civil law case backlogs of American courts have increased alarmingly in consequence of frivolous and unfounded suits all too often brought for their *in terrorem* settlement potential, as in the Nathan case. Yet, most state appellate courts have failed to superintend the correction of the problem. If the Writ of Certiorari is granted, Petitioner will show in his brief the statistics revealing how consistently, in instance after instance, they have reversed trial courts which sought to provide effective relief to victims of maliciously or frivolously filed lawsuits.

In short, it is Petitioner's position that attorneys and the litigants they represent—just as anyone else in our society—must be held answerable in courts of justice for inflicting grievous harm and injury on innocent persons. This is particularly true where the wrongdoers act in the extreme manner shown here. The great social cost of such frivolous litigation and the manner in which it is undercutting respect for the administration of justice, alone, warrant the intervention of this Honorable Court to provide a superintending and correcting influence.

II.

REVERSAL OF THE JUDGMENT FOR PLAINTIFF BY THE APPELLATE COURT GAVE RISE TO SUBSTANTIAL CONSTITUTIONAL QUESTIONS OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT.

As will be shown under Heading III, Illinois has so severely limited and conditioned the tort of malicious prosecution that such cause of action is virtually non-

existent for persons like Dr. Berlin. Where an individual, such as Petitioner, has been injured by the wrongful, wilful, wanton and malicious prosecution of a civil suit charging him with professional misconduct, due process requires that he be provided a judicial remedy for that injury. A total denial of such a remedy is a denial of access to the courts, in violation of the due process and equal protection clauses of the Fourteenth Amendment.

The requirement of due process of law, as guaranteed by the Fourteenth Amendment, embraces those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Powell v. Alabama*, 287 U.S. 45 (1932). This is so whether or not those principles are specifically dealt with in another part of the Constitution. *Id.* at 67; *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965). Here we deal with the very essence of our concept of ordered liberty—the judicial system. Without that system none of the other rights are enforceable. There have been many situations in which it has been held that the procedures of state courts violate federal due process. The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend has long been regarded as a denial of due process of law guaranteed by the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). Due process of law, when applied to judicial proceedings, means a course of legal proceedings according to rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). It requires a proceeding which follows forms of law appropriate to the case, and

just to the parties affected. *Endicott Co. v. Encyclopedia Press*, 266 U.S. 285 (1924).

Due process must be determined "by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceedings appropriate to the nature of the case." *Anderson National Bank v. Luckett*, 321 U.S. 233, 246 (1944). The fundamental requirement of due process is an opportunity to be heard upon such notice and at such proceedings as are adequate to safeguard the right for which protection is invoked. *Louisville & Nashville R.R. v. Schmidt*, 177 U.S. 230 (1900). Procedural due process rights attach where state action condemns a person to "suffer grievous loss of any kind." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951).

In *Shelley v. Kraemer*, 334 U.S. 1, 17 and 18, 92 L. Ed. 1161, 68 S. Ct. 836 (1948) this Court noted that the Fourteenth Amendment protections extend to the action of state courts as well as to other state infringements. The Court said:

> "It has been recognized that the action of state courts in enforcing a substantive common law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.
>
> * * *
>
> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in

construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government."

The right to be heard is "one of the most fundamental requisites of due process" (*Schroeder v. City of New York*, 371 U.S. 208, 212, 9 L. Ed. 2d 255, 259; 83 S. Ct. 279 (1962)). It is a settled principle, that a state must afford its citizens a meaningful opportunity to be heard (*Boddie v. Connecticut*, 401 U.S. 371, 377, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971)). See also *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950); *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970); *Sniadach v. Family Finance Corp., supra*; *Armstrong v. Manzo*, 380 U.S. 545, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965). A person is entitled "upon the most fundamental principles to a day in court . . . " (*Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423, 59 L. Ed. 1027, 35 S. Ct. 625 (1915)). This is because "fundamental fairness" (*Betts v. Brady*, 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (1942) requires that when one's property rights are affected, he must be granted the right to be heard.

The right to obtain entry into the court system is an obvious prerequisite to the right to be heard. "When a person's good name, reputation, honor or integrity is at stake . . . notice and an opportunity to be heard are essential." (*Wisconsin v. Constantineau*, 400 U.S. 433, 437, 27 L. Ed. 2d 515, 519, 92 S. Ct. 507 (1971)). There is no difference between the State's deprivation of property (*Fuentes v. Shevin, supra*), privileges (*Bell v. Burson*, 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971)), or welfare benefits (*Goldberg v. Kelly, supra*), on the one hand, and a state's denial, on the other, of a right of action to a plaintiff who has been injured in reputation and profession, under the conditions presented in this case.

Certainly a person's interest in his good name, reputation, honor and integrity are as fundamental as the rights to privacy (*Griswold v. Connecticut, supra*), marriage-divorce (*Boddie, supra*), travel (*Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969)), property (*Sniadach, supra*, and *Fuentes, supra*), and welfare benefits (*Goldberg v. Kelly, supra*). Consequently, this Court has held that a person's right to protect his privacy, good name and reputation from malicious invasion is paramount even to those First Amendment rights of the news media (*New York Times v. Sullivan, supra*). In the case at bar, the jury returned a verdict finding that the defendants had engaged in wilful and wanton conduct. Yet Dr. Berlin was refused a remedy and denied recovery of the trial judgment by the reversal by the Appellate Court and by the refusal of the Illinois Supreme Court to grant appeal.

As was said by this Court in *Boddie v. Connecticut, supra*, 401 U.S. at 379, "the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." There, this Court held that a state could not deny indigent individuals access to the courts for the purpose of dissolving marital relationships. This holding was based on the right to due process. What was said there applies here as well. When the state requires a defendant to appear and defend himself in court, the state must similarly grant him an adequate remedy for

harm which is done when it is found that there was an improper motive for hailing him into court.

It was also pointed out in *Boddie* that the state maintained an effective monopoly for resolution of disputes involving the marriage relationship: that, since man and wife could not mutually and privately agree to divorce without court sanction, denial of their access to the courts foreclosed their exercise of a possible right of divorce. So, too, here, the refusal of Illinois courts to afford a viable and actual remedy in the circumstances of the case at bar represents a one-sided monopolization of judicial machinery, to the prejudice of citizens such as Dr. Berlin. As Mr. Justice Black noted in his dissent with reference to certain petitions for certiorari pending at the time of the decision of *Boddie*, appearing in *Meltzer v. C. Buck LaCraw & Co.*, 402 U.S. 954, 957-958, 29 L. Ed. 2d 124, 92 S. Ct. 1624 (1971):

> " . . . The wrong that gives rise to a right of damages in tort exists only because the society's lawmakers have created a standard of care and a duty to abide by that standard. The alternatives to resort to judicial process in tort cases are negotiations and settlements, abandonment of recovery, private self-help, and perhaps insurance. With the exception of insurance, the alternatives are exactly the same as in a divorce case—negotiate a separation agreement, decide to continue a marriage relationship, or violate the law."

Petitioner is well aware that "consideration of what procedures due process may require under a given set of circumstances must begin with the determination of the precise nature of the government function involved, as well as of the private interest that has been affected by the government action". (*Cafeteria & Restaurant Workers' Union v. McElroy*, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 1236, 81 S. Ct. 1743 (1961); *Goldberg v. Kelly*,

supra). However, there is no countervailing state interest in protecting those who maliciously file litigation which they know to be without foundation at the expense of the innocent victim. We are not dealing, here, with a case where a legitimate litigant's rights might be "chilled" by allowing a defendant to countersue simply because the original plaintiff did not prevail or even if he were simply chargeable with ordinary negligence.

If the law of Illinois, applicable to the wrongs and injuries of the type suffered by Dr. Berlin, is as arbitrary, capricious and unreasoned as would appear from the Appellate Court's statement of criteria for a cause of action, then such Illinois law must indeed violate all meaningful due process requirements. To illustrate, the first prerequisite announced by the Appellate Court was that Dr. Berlin needed to plead and prove that the Nathan case terminated in Berlin's favor, a requirement that really means that the control of Dr. Berlin's remedy was in the hands of Nathan and her attorneys. Thus, all that they needed to do to defeat Dr. Berlin's remedy and to immunize themselves against suit was to take a dismissal of the Nathan case before proceeding to trial, the thing that actually occurred!

Secondly, the Appellate Court's definition of "malice" is obviously wrong, constituting a wide departure, not only from *New York Times Co. v. Sullivan*, *supra*, and cases which have followed it, but also from any logical and reasonable interpretation of the pleadings in the case at bar concerning the wilful and wanton conduct of the defendants and that they had proceeded with reckless disregard as to the truth or falsity of the charges made against Dr. Berlin. As shown elsewhere in this brief, the third requirement of special injuries, when tested in our modern society, is an

arbitrary and virtually impossible burden of pleading and proof since most of the elements of the "special injury" known to the common law have long since ceased to exist or have become so infrequent in modern-day occurrence as to be virtually meaningless as operative criteria and constraints on the nature of injuries which may be the subject of recoverable damages.

For these reasons the Illinois Supreme Court clearly erred in failing to identify the substantial Federal Constitutional questions which emerged in the Appellate Court reversal; also in failing under its own rules and Supremacy clause considerations to grant an appeal of right to Dr. Berlin which would have afforded him the means of demonstrating that under proper interpretation of expanding and rational legal concepts there could exist an Illinois remedy and a way out of the amazing legal dilemma confronting him and others similarly situated.

The issuance of the Writ of Certiorari by this Honorable Court would have an immediate and salutory effect in confronting the problems of frivolous litigation, permitting an authoritative determination by the Illinois Supreme Court of the question whether there exists in Illinois civil law any viable or meaningful remedy for persons injured in privacy, reputation or otherwise in the manner presented by this case; also permitting a review by that Court to determine whether any such remedy as may exist can meet the due process and equal protection requirements of the Fourteenth Amendment.

Petitioner clearly recognizes that the orderly administration of justice necessarily requires open access to a state's courts for all who proceed in good faith to litigate proper causes. That necessary requirement, essential to the due administration of justice, can be upheld and advanced consistently with relief to Petitioner essential in the special circumstances of this case if he is to encounter anything other than a repeatedly closed door as he seeks a viable judicial remedy. While courts must remain open to all who have legitimate grievances, such, of course, was not the situation here presented. Petitioner submits that the courts of this nation must protect themselves against harassing litigation which has no basis or justification other than a design to set the stage for *in terrorem* settlement recoveries regardless of the harm or injury callously done to the privacy, reputation and rights of the victims singled out for legal assault. While the instant case does not confront the total problems facing judicial systems in the field of frivolous litigation, it does offer a major first step which would provide a proper bridge in seeking to uphold the competing demands for open access to the courts by the legitimate majority of litigants and their attorneys while affording access to the court, consistent with due process and equal protection, to those like Dr. Berlin who are maliciously wronged by those who initially misuse the privilege of access.

III.

THE ILLINOIS COURTS HAVE THE POWER, AS WELL AS THE DUTY, TO GRANT PETITIONER A MEANINGFUL REMEDY.

This case arises out of a medical setting. While this is not the only context in which frivolous suits are found, it is doctors who seem to be in the forefront of those who have sought to convince the courts that some relief be made available for injury inflicted by frivolous litigation

such as this. Implicit in the special findings of the jury is the unescapable fact that the Nathan suit was brought for nothing less than legal harassment—to play on the system where every suit, no matter how frivolous, has some settlement value. Even a baseless and unmeritorious suit must be defended at some cost to a defendant.

There can be no question that the filing of a lawsuit, especially against a professional, publicly charging him with dereliction in his professional duties, causes great harm to such an individual. The mere filing of such a suit in a court of record inevitably leads to impairment of reputation, mental distress, loss of time from business pursuits, and increase of malpractice insurance premiums or perhaps even cancellation of insurance. The personal effects upon such a professional person, his privacy, and reputation, are profound. The filing of such a suit works a significant change upon the physician's attitude toward his patients, to the point that he practices a kind of "defensive" medicine which is expensive to the patient and often counterproductive, adversely affecting the overall quality of medical services for everyone. In addition, there is an adverse impact upon the judicial system itself, in terms of increased numbers of suits which unduly burden court personnel and facilities. See "Physicians Counter-attack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions," 45 Fordham L.Rev. 1003, by Sheila Birnbaum.

The magnitude of the problem was set forth eloquently by Mr. Justice Underwood of the Illinois Supreme Court recently when he said:

> "I believe we have finally reached the point where the public can no longer or will no longer bear the economic burden of our present-day system of tort law. Automobile insurance rates have reached absurd heights, rapidly, and the overbearing cost of medical malpractice insurance with its attendant social ills, has become a matter of common knowledge. In some states, the so-called malpractice crisis has resulted in the closing of hospital emergency services, the withdrawal of insurance underwriters from the field, and the abandonment by some physicians of their chosen specialties." *Renslow v. Mennonite Hospital*, 367 N.E.2d 1250, 10 Ill. Dec. 484, 499 (1977).

It is not so much the tort system itself, but the abuse of that system which has led to the problems cited by Mr. Justice Underwood. The courts certainly have the duty to find a remedy for that abuse. There is no question that many suits, not only against doctors, but against others as well, are brought for the sole purpose of inducing a settlement without any intention that the case be continued to a trial, since the plaintiff and his attorney know full well that at such trial they could not possibly hope to prevail. Often they are withdrawn on the eve of trial as in the voluntary dismissal of the Nathan case. However, the high costs of defending such a suit makes it probable that the defendant, often represented by an insurer, will settle in order to avoid costly and time-consuming litigation. The institution of such suits wilfully, wantonly and without cause is clearly against the policy of the law. Yet, such suits continue to multiply.

The courts have long held that an individual's reputation is entitled to respect and protection. Thus, Mr. Justice Stewart has said:

> " . . . the First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars. The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of law

> to redeem. Yet, imperfect, though it is, an action for damages is the only hope for vindication for redress the law gives to a man whose reputation has been falsely dishonored." *Rosenblatt v. Baer*, 383 U.S. 75, 92, 86 S. Ct. 669, 679 (1966, concurring opinion).

While that statement was made in the context of an action for defamation, the occasion on which the damaging statements are made should not control the result. Indeed, the fact that such statements are recklessly made in court proceedings gives them an indelibility which is not present elsewhere. Having been made in a legal proceeding, they are given more currency and weight. Their existence on the public record continues indefinitely. Being a matter of public record, they are subject to indefinite resurrection and repetition.

Physicians are particularly susceptible to being harmed by such statements. Under Illinois law they are subjected to mandatory disclosure and dissemination of the information contained in medical negligence suits filed against them. Ch. 73 Ill. Rev. Stats., § 767.19 requires that all suits alleging liability on the part of any physician for medically related injuries shall be reported to the Director of Insurance. He is mandated to maintain complete records of all such claims and report that information to the appropriate disciplinary and licensing agencies. Furthermore, the application for renewal of license from the Illinois Department of Registration and Education requires the physician to answer the following question: "Have any lawsuits been filed against you charging malpractice, fraud, or unethical conduct?" (P. Ex. 12) Thus, the Department of Registration and Education, for some purposes, equates an allegation of negligence against a doctor with deliberate and wilful wrongdoing.

These administrative requirements are specifically limited to medical personnel. Any other person who is charged with negligence or misconduct more serious, is not required to have that information maintained by any official department or agency of the State of Illinois. Yet, the mere filing of a suit against a physician, whether it have any validity or be made of whole cloth, is indelibly imprinted upon his record. The damaging effect of groundless malpractice suits upon the average doctor is apparent. The mere institution of a suit against him is sufficient to place him in jeopardy of further action by other official agencies of the State.

There is no doubt that the misuse of the courts has become a serious problem in the general administration of justice. This was recognized recently by this Court in a case involving the right of an individual to sue for damages under the Securities Laws of the United States. In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740, 95 S. Ct. 1917 (1975), the Court expressed great concern about the danger of vexatious and unfounded litigation, recognizing that a complaint, "which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment." The Court recognized that "the very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Id.*

The Circuit Court of Cook County and the jury recognized this. The Appellate and Illinois Supreme Courts did not. The Appellate Court explicitly, and the Illinois Supreme Court by its silent acquiescence,

relegated Petitioner to an ancient common law remedy which exists in theory only.

Illinois is in the minority in requiring that a malicious prosecution plaintiff plead and prove "special damages" in order to make out a cause of action. Indeed, that view is a perversion of the English rule. The requirement under the English rule that special injury be shown before malicious prosecution will lie is based upon the premise that in the prior litigation the prevailing party would be granted his full costs and attorney's fees and thus would be made largely whole for any wrong done him in that litigation. 25 Halsbury, The Laws of England, § 717 (3d Ed. 1958); 52 Am. Jur. 2d Malicious Prosecution § 9 (1970). Such recoveries were not carried forward in the Illinois law.

Any protection purportedly given by the present cause of action for malicious prosecution in Illinois is illusory. An analysis of such cases brought in Illinois since 1848 demonstrates that fact most clearly. There are 191 reported decisions in Illinois dealing with malicious prosecution. The great majority of them were determined in favor of the defendant. A breakdown of those cases shows the following:

Ruling for Defendant in Circuit Court—affirmed on appeal	57
Ruling for Defendant in Circuit Court—reversed and remanded	14
Ruling for Plaintiff in Circuit Court—reversed and remanded	38
Ruling for Plaintiff in Circuit Court—reversed outright	41
Ruling for Plaintiff in Circuit Court—affirmed on appeal	41

Thus, in only 21% of those cases for malicious prosecution which have been reported has a plaintiff been able

to obtain and sustain a recovery. Of those 41 cases where the plaintiff has ultimately prevailed, 33 have arisen out of an underlying criminal suit. Only eight have arisen out of an underlying civil suit—4% of the malicious prosecution suits decided on appeal.

Thus, it will be seen that, in Illinois, the old common law malicious prosecution cause of action simply gives no substantial protection to those who are damaged by the wrongful filing of litigation against them. It is a dead letter, in fact and in legal utility.

"Special injury" situations in which a person's property may be seized in a judicial proceeding prior to final judgment against him have been shrinking steadily. Thus, for example, the Court has held that replevin statutes which authorize seizure of a person's possessions without a prior hearing where the defendant has an opportunity to be heard are violative of due process. *Fuentes v. Shevin, supra.* In fact, the instances of direct interference with a person's property by virtue of judicial proceedings have shrunk almost to the vanishing point, except where it has been held after a full determination that such seizure is justified. In effect, therefore, to hold that special damages must be demonstrated before a malicious prosecution cause of action may be brought is to hold that no malicious prosecution suit may arise out of a civil proceeding.

It is manifest that this condition does not provide the public with any meaningful protection against wrongfully filed suits. Not only must a cause of action serve to protect the individual, but equally it must protect the interests of society as well.[6] Thus it has been said:

[6] Suits such as Petitioner's will not chill the rights of the honest litigant. This Court has stated recently that there is no policy or constitutional inhibition against chilling knowing falsity:

(Footnote continued on following page)

"The malicious prostitution of legal remedies to subserve unworthy personal ends is not only an injury to the victim of the particular persecution, but also to society at large, if it is suffered to go unwhipped of justice. If the law will not punish such conduct, public confidence in the merits of our system of jurisprudence must inevitably be shaken, and the courts themselves will seem to have forsaken their high function as protectors and vindicators of invaded rights, and to have become, instead, the accomplices of evil men." *Kolka v. Jones*, 71 N.W. 558, 565 (N.D. 1897).

To argue, as the Illinois Appellate Court did, that relaxation of the strict common law requirements of special damages will chill the honest litigant, and deter the bringing of meritorious claims is to assume a result which has no empirical basis. The fact that the Illinois rule is a minority one in this area goes far to demonstrate that fallacy. Certainly, there is no reason to believe that those states in the majority, which do not require such a showing of "special injury" have found this to be a problem or consequence of adopting a meaningful remedy. There is nothing to indicate a trend toward the minority view which would occur if that were the fact. Instead, the number of suits such as the instant one which are being filed show just the

[6] *continued*

"But if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. '[T]here is no constitutional value in false statements of fact.' *Gertz v. Robert Welch, Inc.*, 418 U.S., at 340."

Herbert v. Lando, ... U.S. ..... , ... S.Ct. ..... , 47 U.S. Law Week, 4401, 4405 (1979). No honest and responsible litigant need fear a chilling of his rights by the existence of a cause of action which penalizes only wilful and wanton conduct.

opposite—that the number of spurious suits is constantly increasing to the detriment of all society.

To fail to respond to such a situation is not merely to deny those such as Petitioner due process of law; it is also to deny our unique heritage of the common law. The glory of the common law is its ability to accommodate and respond to changing societal values. A slavish rote adherence to orthodox rules drawn arbitrarily from the distant past inhibits that capacity for change which is necessary in a changing society. The Illinois Supreme Court itself has said:

"Every person owes to all others a duty to exercise ordinary care to guard against injury which may naturally flow as a reasonably probable and foreseeable consequence of his act, and the law is presumed to furnish a remedy for the redress of every wrong. The duty to exercise ordinary care to avoid injury to another does not depend upon contract, privity of interest, or the proximity of relationship, but extends to remote and unknown persons." *Kahn v. James Burton Co.*, 5 Ill. 2d 614, 622, 126 N.E.2d 836 (1955).

The proper approach was well stated by Justice Linn of the Illinois Appellate Court, concurring in *Walton v. Norphlett*, 56 Ill. App. 3d 4, 371 N.E.2d 978, 13 Ill. Dec. 886, 890 (1977):

"It remains for the judiciary to abandon outmoded theories of liability and to bring the law into focus with modern social mores and humanitarian values. In the final analysis, the law, to remain an instrument of justice, must be functional and responsive to societal needs."

In other types of cases, the Illinois Supreme Court has wisely recognized this overriding policy. In *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill. 2d 11, 26, 163 N.E.2d 89, 96 (1959), the Court said:

> "The doctrine of *stare decisis* is not an inflexible rule requiring this court to blindly follow precedents and adhere to prior decisions, and that when it appears that public policy and social needs require a departure from prior decisions, it is our duty as a court of last resort to overrule those decisions and establish a rule consonant with our present-day concepts of right and justice."

The Illinois Supreme Court has also taken that approach in many recent cases. Thus, in *Darling v. Charleston Community Hospital*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), charitable immunity was abolished. In *Suvada v. White Motor Co.*, 32 Ill. 2d 612 (1965), strict liability for damage as a result of defective products was instituted.

More recently, that court said:

> "Where this court has created a rule or doctrine which, under present conditions, we consider unsound and unjust, we have not only the power but the duty to modify or abolish it." *Skinner v. Reed-Prentice Division Package Machinery Company*, 70 Ill. 2d 1, 374 N.E.2d 437, 15 Ill. Dec. 829, 834 (1978).

Despite the clear import of the holdings of numerous cases, the Illinois Appellate and Supreme Courts have refused to grant Petitioner the same rights granted to others suffering actual and generally cognizable damages. They have closed their doors to litigants such as Dr. Berlin who are damaged by the misuse and perversion of the judicial process. The result of such holding is to carve out an exception to the general rule of liability guaranteed by the due process clause and the equal protection clause. It grants immunity from suit to a particular and favored class of citizens. It is of particular concern when the privileged class is made up of attorneys-at-law.

An attorney has a unique position in the law. Only he may represent others before the court. He has a duty, therefore, not only to his clients, but to the judicial system itself, to act properly in discharging that right which carries with it heavy responsibility. It is not only his reputation which he sullies when he needlessly inflicts harm upon others by knowing misuse of the judicial system, but the reputation of the legal profession, as a whole. *People, ex rel, Cutler v. Ford*, 54 Ill. 520, 522 (1870). So apparent is this duty that the Code of Professional Responsibility promulgated by the American Bar Association specifically provides:

> "A lawyer shall not file suit . . . when he knows or when it is obvious that such actions would serve merely to harass or maliciously injure another." D.R. 7-102(A)(1).
>
> "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." E.C. 7-10

These statements of ethical concern must not be allowed to become meaningless platitudes. It makes no sense to say that an attorney may be disciplined by courts for violating such ethical canons, but may not be held accountable to the one whom his actions have clearly harmed. Yet, this is what the courts of Illinois have done. In refusing to take jurisdiction over this case and hear the arguments of Petitioner, as mandated by its own rules, the Illinois Constitution and the Supremacy clause of the Constitution of the United States, the Illinois Supreme Court has failed and twice declined to recognize the important Federal Constitutional issues raised by this case. Only this Court is now available to right that wrong.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Honorable Court to grant its Writ directed to Illinois Supreme Court (or, alternatively, to the Illinois Appellate Court if deemed more appropriate), (a) noting the emergence in the action and opinion of the Appellate Court of substantial Federal Constitutional questions of due process and equal protection, (b) directing the Illinois Supreme Court to grant appeal and review as a matter of right to determine in that Court whether present Illinois law affords meaningful remedy consistent with due process and equal protection to Petitioner and all others similarly situated, and (c) for such other relief and remedy in the premises as may be available or required as a matter of constitutional right or privilege.

Respectfully submitted,

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APPENDIX A

Opinion of the Appellate Court of Illinois, First District

MR. JUSTICE ROMITI delivered the opinion of the court:

This case involves another of the many retaliatory actions which physicians in Illinois and other states who have been sued for malpractice are filing against both the original plaintiff and the original attorney. In this case the original plaintiff's husband was sued as well. In accord with the other cases in Illinois and elsewhere, we hold that the complaint which failed to allege either malicious intent or special damages failed to state a cause of action. We also hold that the court correctly dismissed the physician's claim against the husband for barratry.

The pleadings reveal that on October 1, 1973 Harriet Nathan entered the Skokie Valley Community Hospital complaining of an injury to the little finger of her right hand. An x-ray was taken under the supervision of Dr. Berlin, a radiologist on the staff of the hospital. Dr. Berlin read the film as revealing a dislocation of the finger. Dr. Meltzer then applied treatment appropriate for a dislocation. In November, another x-ray was taken. This x-ray disclosed that there had been a chip fracture of that finger.

On September 11, 1975, about two weeks before the statute of limitations would have run, Harriet Nathan, through her attorneys, Benjamin and Shapiro, filed suit against Dr. Berlin, Dr. Meltzer and the hospital alleging various acts of malpractice in the taking of the x-rays and the making of the diagnosis. Dr. Berlin thereupon filed a suit

against Mr Nathan (at whose specific instance and request, he alleged, the malpractice suit was specifically brought), Mrs. Nathan and her attorneys Benjamin and Shapiro. In Count I of that suit he alleged that all four defendants owed him a duty to refrain from willfully and wantonly bringing suit against him without having reasonable cause to believe that he had been guilty of malpractice; that the defendants instead, although having no cause whatsoever to believe he had been guilty of malpractice, had instituted suit with reckless disregard as to the truth or falsity of the allegations. Specifically, Dr. Berlin in Count I complained that Benjamin and Shapiro had acted willfully and wantonly and without probable cause since they had not, before filing suit, obtained an opinion from another physician as to the quality of the x-rays and the correctness of their interpretation thereof; and moreover, that the ad damnum ($125,000), which bore no reasonable relationship to the injuries allegedly sustained, was devised to intimidate Dr. Berlin and might affect his ability to procure malpractice insurance at reasonable rates. Dr. Berlin in Count I specifically alleged that Harriet Nathan brought suit willfully and wantonly and without probable cause in that she at no time prior to suit obtained from another physician an opinion as to the quality of the x-rays, the correctness of their interpretation or an opinion whether the condition of which she complained resulted from malpractice by either Dr. Berlin or Dr. Meltzer. Dr. Berlin further alleged that the Nathans had been told by another orthopedic surgeon, prior to the institution of the suit, that no malpractice had occurred but that they willfully and wantonly incited and instituted the suit in retribution for real or imagined discourtesies to them by Dr. Meltzer.

Finally, Dr. Berlin complained that as a result of these actions his reputation in his profession had been attacked, he had suffered mental anguish, he had been caused to devote much time to the defense of the malpractice suit and, that because of the institution of the suit, he would be required to pay increased premiums for his malpractice insurance coverage. In Count II, Dr. Berlin claimed that Gilbert Nathan, knowing the malpractice suit to have no merit but intending to extort money either from Dr. Berlin or his malpractice insurance company, wickedly and willfully caused this suit to be brought and caused Harriet Nathan to prosecute said suit, contrary to the Illinois barratry statute. Ill. Rev. Stat. 1975, ch. 13, par. 21.

In Count III, Dr. Berlin alleged that the attorneys, Benjamin and Shapiro, had a duty to the plaintiff not to file the malpractice lawsuit without reasonable evidence to support the allegations therein since, as attorneys, they were particularly aware of the time and expense that litigation causes and could foresee the harm an unfounded lawsuit could cause to the reputation and mental well-being of a physician; that by filing the complaint without reasonable cause, the attorneys fell below the standard of care required of attorneys in the performance of their professional duties in good faith and in a legal manner and were negligent towards Dr. Berlin.

Count II was dismissed by the trial court upon Gilbert Nathan's motion before trial. This suit was consolidated with the original suit for discovery and for trial.

On May 27, 1976 the original malpractice suit was voluntarily dismissed, with prejudice, on the motion of Harriet Nathan. The action on the countersuit then proceeded

to trial. At the close of the trial the jury was not instructed as to the elements involved in a suit for malicious prosecution but were solely instructed as follows: as to Count I that the plaintiff claimed that the conduct of the defendants was willful and wanton in that a medical malpractice complaint was filed against him when there was no reasonable cause to believe that such a cause of action existed and that the defendant's act was a proximate cause of his damages (all of which the defendants denied); as to Count II (originally Count III) that the plaintiff claimed that he sustained damages while exercising ordinary care and the defendants Benjamin and Shapiro were negligent in filing and prosecuting a lawsuit without taking proper steps to determine that there was reasonable cause to believe any cause of action existed and that this was a proximate cause of his damage (all of which the defendants denied). The jury was also instructed that in filing a lawsuit an attorney must possess and apply the knowledge, skill, care and regard for potential defendants that is ordinarily used and shown by reasonably well-qualified attorneys in the locality. And finally, the jury was instructed that the defendants had a duty before and at the time of the occurrence to refrain from willful and wanton conduct which would endanger the rights of the plaintiff.

The jury found all four defendants guilty of willful and wanton misconduct proximately causing injury to Dr. Berlin and awarded Dr. Berlin $2,000 in compensatory damages and $6,000 in punitive damages.

All the parties have appealed.

I.

The *amicus curiae* has argued that the jury verdict should be upheld since the jury properly found defendant guilty of malicious prosecution. We disagree since we find that the plaintiff's complaint was not sufficient to state a claim for malicious prosecution against any of the defendants, and the instructions to the jury certainly did not submit a claim for malicious prosecution.

A.

Tort litigants, such as the Nathans, may be held liable for malicious prosecution. (25 Illinois Law and Practice *Malicious Prosecution* §§ 1 et seq. (1956).) However, since the law does not look with favor on such suits (*Schwartz* v. *Schwartz* (1937), 366 Ill. 247, 8 N.E.2d 668; *Carlyle* v. *Carlyle* (1960), 28 Ill. App. 2d 90, 170 N.E.2d 790; *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E. 2d 685), there are strict limitations on the availability of such suits. Suits for malicious prosecution cannot be maintained in Illinois unless the plaintiff alleges and proves that the plaintiff in the original tort action acted maliciously and without probable cause (*Hill Co.* v. *Contractors' Supply Co.* (1911), 249 Ill. 304, 94 N.E. 544; *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.2d 685); that the prior cause terminated in the plaintiff's favor (*Schwartz* v. *Schwartz* (1937), 366 Ill. 247, 8 N.E.2d 668; *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.2d 685); and that some special injury not necessarily resulting in any and all suits prosecuted to recover for like causes of action was suffered. (*Schwartz* v. *Schwartz* (1937), 366 Ill. 247, 8 N.E.2d 668; *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.

2d 685; *Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E.2d 480.) It is clear that in this case neither of the last two elements was pleaded and, even if we liberally construe the complaint to allege that the suit was brought maliciously and without probable cause by the Nathans, that issue was not submitted to the jury.

B.

Special damages as defined by the Illinois Supreme Court in *Schwartz* v. *Schwartz* are those not necessarily resulting in any and all suits prosecuted to recover for like causes of action. The only damages that Dr. Berlin claimed he suffered are (1) his reputation in his profession has been attacked; (2) he has suffered mental anguish; (3) he has been forced to spend time on the defense; (4) he will be required to pay increased insurance premiums. The first three items of damage claimed are so patently common to all litigation that no discussion is warranted. We agree, moreover, with the Illinois court in *Pantone* that an increase in insurance premiums, while perhaps not a necessary result of the litigation, is, assuming the allegation is anything more than pure speculation, an item necessarily incident to all malpractice cases and not therefore amounting to damages suffered specially by Dr. Berlin as distinct from other physicians who have been defendants in malpractice suits.

The defendant and *amicus curiae* both, however, contend that the requirement of special damages is unreasonable and should be abolished. First of all, we have no authority to overrule the Illinois Supreme Court. (*Chicago Title & Trust Co.* v. *Guarantee Bank* (1978), 59 Ill. App. 3d 362, 16 Ill. Dec. 649, 375 N.E.2d 522.) But in any event, we agree with *O'Toole* v. *Franklin* (1977), 279 Or. 513, 569 P.

2d 561 and *Ammerman* v. *Newman* (D.C. 1978), 384 A.2d 637 which rejected precisely the same argument. As the latter court stated at 384 A.2d 641:

> "Appellant effectively concedes that he has suffered no injury that would not normally occur as a consequence of a malpractice suit, and appears to recognize that the authority in this jurisdiction does not support his claim. He seeks to avoid the application of the rule by arguing that it is inequitable in the context of medical malpractice actions. He contends that the fact that such actions are particularly harmful to the reputations and livelihood of physicians calls for a modification of the rule with respect to them. The purpose of the special injury rule, however, is to strike a balance between allowing free access to the courts for the vindication of rights without fear of a resulting suit, and the undue exercise of such right. *Davis* v. *Boyle Bros.*, D.C. Mun. App., 73 A.2d 517, 521 (1950). Appellant's argument, if accepted, would upset that delicate balance. The nature of his profession, given its profound impact on the lives of those with whom he deals, cannot be allowed to insulate him from potential liability. In order to maintain a free access to the courts by persons with grievances who might otherwise be restrained from seeking redress because of their fear of liability should they fail, the special injury rule has consistently been upheld.
>
> The limitation is sound. When disputes reach the litigious stage, usually some malice is present on both sides. Friendly tort suits are not common. Nor is existence or want of probable cause always easy to determine until the event of the litigation is known. Some margin of safety in asserting rights, though they turn out to be groundless and their assertion accompanied by some degree of ill-will, must be maintained.

Otherwise litigation would lead, not to an end of disputing, but to its beginning, and rights violated would go unredressed for fear of the danger of asserting them. [*Melvin* v. *Pence*, 76 U.S. App. D.C. 154, 157, 130 F.2d 423, 426 (1942).]"

C.

The complaint against the Nathans failed to allege that the malpractice action had been terminated in plaintiff's favor, obviously for the simple reason that it had not been terminated when the complaint was filed, although it was terminated before the counterclaim was actually tried. Nevertheless, if we were to permit such an action under these circumstances, we would create the incongruous situation of permitting the filing of a suit before the cause of action existed or the statute of limitations commenced to run. *Babb* v. *Superior Court* (1971), 3 Cal. 3d 841, 92 Cal. Rptr. 179, 479 P.2d 379.

D.

Basically, the complaint against the Nathans merely alleges that their conduct was willful and wanton. Willful and wanton conduct does not amount to malice. (Compare *Myers* v. *Krajeska* (1956), 8 Ill. 2d 322, 134 N.E. 277.) However, a suit brought for an improper motive may be malicious (*Carlyle* v. *Carlyle* (1960), 28 Ill. App. 2d 90, 170 N.E.2d 790), and Dr. Berlin did allege that the Nathans brought suit solely in retribution for the real or imagined discourtesies of Dr. Meltzer. But, the plaintiff clearly abandoned any attempt at trial to prove a cause of action against the Nathans for malicious prosecution since in the instructions submitted to the jury, the jury was solely instructed as to willful and wanton misconduct and was not instructed as to the elements of a claim for malicious prosecution. The

burden was on the plaintiff to submit the issue (35 Illinois Law and Practice *Trial* §251 (1958)); having failed to do so he cannot contend on appeal that he had a claim for malicious prosecution. And, in all fairness to the plaintiff, he has not made such a claim; only *amicus curiae* has done so.

E.

A suit for malicious prosecution can be brought against an attorney since an attorney cannot always justify himself merely by showing he followed his client's instructions. (*Burnap* v. *Marsh* (1852), 13 Ill. 535.) If an attorney, acknowledging there is no cause of action, and knowing this dishonestly and for some improper purpose files suit, or even if an attorney merely acts knowing that his client has no just claim and that his client is actuated by illegal or malicious motives, the attorney may be held liable for malicious prosecution. *Burnap* v. *Marsh* (1852), 13 Ill. 536; Annot., 27 A.L.R.3d 1113 at 1129-1133 (1969).

However the plaintiff's complaint was totally insufficient to support a claim against the attorneys for malicious prosecution. First, there is no allegation that the attorneys acted maliciously or knew that their client did so. As we noted previously, willful and wanton conduct does not constitute malicious conduct, particularly where, as here, no improper motive of any kind on the part of the attorneys is suggested. Basically, the plaintiff simply complains that the defendants did not get another doctor's opinion before filing suit. But the undisputed facts are that the finger was fractured and that this fracture was not discovered for several weeks. Perhaps more investigation before filing suit would have been prudent, but as the Louisiana court

remarked in *Spencer* v. *Burglass* (Ct. of App. 1976), 337 So.2d 596 at 599, 600:

> "There are no factual allegations to suggest that when defendant filed his client's suit he knew the allegations were false or that he had a reckless disregard as to whether the allegations were false or not. On the contrary, plaintiff's allegations are to the effect that defendant simply did not know enough about the case at the time he filed it and now in retrospect plaintiff would say this was malice on defendant's part. If that be so many a successful lawsuit would never have been or never would be filed because oftentimes the case comes to the attorney just prior to prescription date and the evidence is not discovered and developed until after the suit is filed. We therefore conclude that the allegation of 'frivolously filing suits' cannot be construed as an allegation of malice.
>
> • • •
>
> Finally, there is the allegation that defendant failed to obtain 'competent medical advice,' etc. Does this constitute an allegation of malice? It would seem that an affirmative answer to this query would mean that before the attorney brings a malpractice case to trial he must find a medical person who supports the attorney's theory or that of his client, who is willing to testify favorably and who is 'competent' by someone's (plaintiff's?) standards. If he finds no such person but he nevertheless, places whatever evidence he can before the court perhaps relying on circumstantial evidence, reasonable inferences and common sense and perhaps realizing that he will probably lose, he runs the risk of having his conduct branded as malicious. When the bald allegation in question is considered in this light it can hardly be construed as one alleging malice. At worst, the allegation is that defendant went to trial with a poor case and got his just desserts, to

> wit, he lost. If that constitutes malice, the courtrooms are full of malicious attorneys. This we cannot accept."

Furthermore, as we discussed earlier, the complaint was insufficient since no special damages were alleged. And finally, there is no allegation that the malpractice case was terminated favorably to the present plaintiff before the complaint was filed. In fact it is conceded that at the time of filing, the original tort action was still pending. As the court observed in *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 820, 14 Ill. Dec. 489, 492, 372 N.E.2d 685, 688, to permit the filing of such an action against the attorney prior to the termination of the initial malpractice action "would tend to drive a wedge between the malpractice plaintiff and his attorney; the attorney may be diverted from properly preparing the client's malpractice case by the necessity for readying his own defense to the physician's countersuit, and may, in some cases, even be forced to withdraw from the malpractice action." This we cannot permit.

II.

It is clear, therefore, that Dr. Berlin's complaint is insufficient to allege a cause of action for malicious prosecution. Indeed, he has not on appeal contended that it is. What he does claim, contrary to the well-established law in Illinois that "a person is not liable for bringing any suit, criminal or civil, • • •, if the court had jurisdiction of the subject matter and the parties, unless he acts maliciously and without probable cause" (*Hill Co.* v. *Contractors' Supply Co.* (1911), 249 Ill. 304, at 310, 94 N.E. 544, at 546), is that he should be able to recover against all of the defendants for the willful and wanton filing of a frivolous lawsuit. But *Hill* still represents the state of the law in Illinois

(*Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E.2d 480.) Furthermore, since "it takes a 'special injury' to recover for the *malicious* pursuit of an unfounded civil action, it would be incongruous to base a recovery on mere carelessness without the same requirement." (*O'Toole* v. *Franklin* (1977), 279 Or. 513, 569 P.2d 561, at 566.) Likewise, we agree with the court in *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.2d 685 that the failure to plead the outcome of the malpractice action would constitute a fatal defect to Dr. Berlin's complaint, even if he were correct in his contention that malicious prosecution is not the sole course of action available to a party who is put to the expense and vexation of defending a baseless lawsuit. The considerations underlying the requirement that a complaint for malicious prosecution plead the favorable outcome of the prior cause are, in effect, broader than the rule itself. Indeed, we hold that permitting the filing of such a complaint against the attorney before the termination of the original suit would be against public policy since it would tend, as we pointed out earlier, to create a conflict of interest between attorney and client.

A.

Dr. Berlin, however, contends that Article I, Section 12 of the Illinois Constitution requires the creation of a new cause of action. Section 12 reads as follows:

> "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."

It is well established in Illinois that Section 12, like its predecessor Section 19 of Article II of the 1870 Illinois

Constitution,[1] is "an expression of a philosophy and not a mandate that a 'certain remedy' be provided in any specific form or that the nature of the proof necessary to the award of a judgment or decree continue without modification." (*Sullivan* v. *Midlothian Park District* (1972), 51 Ill. 2d 274, at 277, 281 N.E.2d 659 at 662.) So long as some remedy for the alleged wrong exists, Section 12 does not mandate recognition of any new remedy. (*Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E.2d 480.) As recognized by the court in *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.2d 685, in this type of case one may file an action for malicious prosecution, or perhaps for abuse of process, and even if those two remedies are not applicable, he may, if put to the burden of defending allegations made without reasonable cause, recover attorney's fees under section 41 of the Civil Practice Act (Ill. Rev. Stat. 1977, ch. 110, par. 41), by motion in the original action. He may also, though we doubt it is much comfort to the plaintiff, in an appropriate case, be instrumental in the institution of disciplinary proceedings against the offending attorney. Section 12 mandates no additional remedies. (*Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E.2d 480.) The mere fact that the relief provided by these remedies is limited (*Cunningham* v. *Brown* (1961), 22 Ill. 2d 23, 174 N.E.2d 153), or that the plaintiff is unable to meet the burden of proof required does not dictate the creation of new remedies.

---

[1] Section 12 made two changes. One was to add protection against invasion of privacy. The other was the substitution of the word "shall" for the words "ought to." However it is clear from the legislative history that the latter change was not "to create any new rights or to limit any rights." 3 Record of Proceedings, Sixth Illinois Constitutional Convention 1491.

The failure to state a cause of action cannot be cured by alleging that the plaintiff should have a remedy as provided in Section 12. Constitutional rights are not infringed where an insufficient complaint is dismissed. (*Belmar Drive-In Theatre* v. *Illinois State Toll Highway Commission* (1966), 34 Ill. 2d 544, 216 N.E.2d 788; *Zamouski* v. *Gerrard* (1971), 1 Ill. App. 3d 890, 275 N.E.2d 429.) And as observed in *O'Toole* v. *Franklin* (1977), 279 Or. 513, 569 P. 2d 561 at 565 "it would be ironic to derive a looser test of malicious prosecution from a constitutional guarantee of access to the courts."

B.

We are not persuaded by the plaintiff's argument that in light of the recent rise in the volume of malpractice litigation, including the filing of frivolous malpractice suits purely for their settlement value, public policy demands the creation of a cause of action to protect the courts from their misuse and the physician from the resulting harm.

First of all, we agree with the court in *Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E.2d 480 that it is doubtful that the creation of this new remedy would reduce the amount of litigation; it is far more likely that litigation would be increased since each successful defendant would bring suit against the original plaintiff. (See also *Smith* v. *Michigan Buggy Co.* (1898), 175 Ill. 619, 51 N.E. 569.) But even if the creation of this new remedy would reduce congestion in the courts, the price the public would have to pay for the benefit is too great. It is the overriding public policy of Illinois that potential suitors must have free and unfettered access to the courts. (*Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E.2d 480; *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E. 2d 685.) The Illinois courts have consistently adhered to the established policy "that the courts should be open to litigants for settlement of their rights without fear of prosecution for calling upon the courts to determine such rights" (*Franklin* v. *Grossinger Motors Sales, Inc.* (1970), 122 Ill. App. 2d 391, at 396, 259 N.E.2d 307, at 309, *leave to appeal denied, cert. denied,* 403 U.S. 911 (1971)), and have never deviated from the philosophy expressed in *Smith* v. *Michigan Buggy Co.* (1898), 175 Ill. 619 at 628, 51 N.E. 569, at 571 that:

> "[I]t must be remembered that the courts are open to every citizen, and every man has a right to come into a court of justice and claim what he deems to be his right without fear of being prosecuted for heavy damages. If such actions are allowed, it might oftentimes happen that an honest suitor would be deterred from ascertaining his legal rights through fear of being obliged to defend a subsequent suit, charging him with malicious prosecution."

Thus, our courts have consistently applied, and refused to lessen, the elements necessary in proving a case for malicious prosecution. See *Schwartz* v. *Schwartz* (1937), 366 Ill. 247, 8 N.E.2d 668; *Smith* v. *Michigan Buggy Co.* (1898), 175 Ill. 619, 51 N.E. 569; *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.2d 685; *Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E. 2d 480; *Westphal* v. *Fridly* (1975), 34 Ill. App. 3d 611, 339 N.E.2d 30; *Franklin* v. *Grossinger Motor Sales, Inc.* (1970), 122 Ill. App. 2d 391, 259 N.E.2d 307, *leave to appeal denied, cert. denied,* 403 U.S. 911; *Caspers* v. *Chicago Real Estate Board* (1965), 58 Ill. App. 2d 113, 206 N.E.2d 787.

While it is true that, as the defendant contends, "no man has a constitutional right to maintain vexatious or harassing litigation," (*Guttman* v. *Guttman* (1969), 65 Ill.App.2d 44, at 53, 212 N.E.2d 699, at 704), nevertheless "[s]ome sort of balance has to be struck between the social interests in preventing unconscionable suits and in permitting honest assertion of supposed rights. These interests conflict because a suit which its author thinks honest may look unconscionable to a jury." *Soffos* v. *Eaton* (1945), 80 U.S. App. D.C. 306, at 307, 153 F.2d 682 at 683; *O'Toole* v. *Franklin* (1977), 279 Or. 213, 569 P.2d 561 at 564. Since, as the court in *Lyddon* pointed out, the very purpose of a court of law is to determine whether an action filed by a party has merit, it would be incongruous to hold a party liable in tort for negligently or even wantonly failing to determine in advance that which ultimately only the court can determine.

And as pointed out in *Lyddon* v. *Shaw* at 56 Ill. App. 3d 822, 14 Ill. Dec. 494, 372 N.E.2d 690:

> "These considerations apply with equal force, not only to a party litigant, but to his counsel, (see *Spencer* v. *Burglass* (1976), La. App., 337 S.2d 596), since a litigant's free access to the courts would frequently be of little value to him if he were denied counsel of his choice by a rule which rendered attorneys fearful of being held liable as insurers of the merits of their client's case, and therefore unwilling to undertake representation in close or difficult matters."

See also *Norton* v. *Hines* (1975), 49 Cal. App. 3d 917, 123 Cal. Rptr. 237.

Indeed, we believe it would be contrary to public policy for us to hold that an attorney has a duty to an intended defendant not to file a weak or perhaps "frivolous" lawsuit since we would be creating an insurmountable conflict of interest between the attorney and the client. The attorney owes a duty to his or her client to present the client's case vigorously in a manner as favorable to the client as the rules of law and professional ethics demand. (*Norton* v. *Hines* (1975), 49 Cal. App. 3d 917, 123 Cal. Rptr. 237.) When a tort action is brought he has but one intended beneficiary, his client; the adverse party is certainly not an intended beneficiary of the adverse counsel's client. Thus, even in states extending the attorney's responsibility and liability to intended beneficiaries of the client's conduct, such as intended legatees under a will, no liability to the adverse party sued by the client has been found absent malicious prosecution. *Norton* v. *Hines* (1975), 41 Cal. App. 3d 917, 123 Cal. Rptr. 237.

C.

Furthermore, we are not convinced by Dr. Berlin's argument that since the defendant attorneys are officers of the court and can be disciplined by the court, they should be held liable in tort for breach of Disciplinary Rule 7-102 and Ethical Consideration 7-10 of the Illinois Code of Professional Responsibility (1970). First of all, the Code is not "designed solely to prevent the risk of the plaintiff's being piqued at being sued. That would be an oversimplification of the ethical complexities which govern the lawyer's conduct to his client, the court and the public." (*Spencer* v. *Burglass* (La. App. 1976), 337 So.2d 596 at 601.) Sec-

ondly, we see no violation of the Code. The provisions relied on by Dr. Berlin read as follows:

> Illinois Code of Professional Responsibility, D.R. 7-102(A)(1) (1970):
>
> "... a lawyer shall not: (1) File a suit * * * when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."
>
> Illinois Code of Professional Responsibility, E.C. 7-10 (1970):
>
> "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."

As we have already noted, plaintiff in his complaint at no time alleged that the defendant attorneys filed the action knowing it would serve merely to harass or maliciously injure another. All he alleged was that they failed to make the investigation he, Dr. Berlin, felt was proper instead of relying on their client's statement. But, to reiterate, "if that constitutes malice, the courtrooms are full of malicious attorneys." (*Spencer* v. *Burglass* (La. App. 1976), 337 So. 2d 596 at 600.) And the injunction to avoid infliction of needless harm can hardly be interpreted as an injunction against the filing of weak lawsuits. The attorney is liable if he is guilty of malicious prosecution, that is enough. To create liability only for negligence, for the bringing of a weak case, would be to destroy his efficacy as advocate of his client and his value to the court, since only the rare attorney would have the courage to take other than an "easy" case.

D.

We are aware that, as Dr. Berlin contends, some doctors are being flooded with lawsuits; that all at least suffer the loss of time, fees, and the possibility of an increase in insurance premiums, or even the cancellation of their malpractice policies. We are also aware that the cost of the litigation can be great, whether borne by the doctor himself or by his insurance company. As to this latter problem, we note that the legislature has already responded, to a certain extent, since in 1976 it amended section 41 of the Illinois Civil Practice Act, which subjects a party pleading false allegations to the payment of attorney's fees, by eliminating the former requirement that the allegations be shown to have been made in bad faith, and substituting a requirement for a lesser showing that the allegations were made "without reasonable cause." (Ill. Rev. Stat. 1977, ch. 110, par. 41; see *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.2d 685.) While we can sympathize with the physician's predicament, as with that of any person who, confronted with an unwarranted and unfounded lawsuit, must still expend time, money and suffer anxiety, nevertheless we feel, as have the other courts which have considered the problem (see Annot. 84 A.L.R. 3d 555, et seq.[2]), that this, unfortunately, is a price which must necessarily be paid to keep the courts open to the

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[2] The plaintiff has cited no case where an appellate court has upheld a complaint brought by a treating physician against his former patient or if deceased, the patient's family or the patient's attorneys for the bringing of a tort action against the physician where malicious prosecution has not been shown and this court has found none. *Drago* v. *Bounagurio* (1978), 61 A.D. 2d 282, 402 N.Y.S. 2d 250 cited by the plaintiff is not in point. In that case,

(footnote continued on following page)

people. It remains a valid truism that "[s]uch ordinary trouble and expense as arise from the ordinary forms of legal controversy should be endured by the law-abiding citizen as one of the inevitable burdens which men must sustain under civil government." (*Smith* v. *Michigan Buggy Co.* (1898), 175 Ill. 619, at 629, 51 N.E. 569, at 572.) The importance of free access to the courts demands that this access be maintained even though occasionally some innocent person must suffer.

III.

While we agree with Mr. Nathan that the claim against him must be dismissed for the same reason it must be dismissed as to the other three defendants, we cannot agree with his contention that he also cannot be held liable because he is not responsible for his wife's conduct. While the Married Women's Act makes it clear that damages for a civil injury committed by a married woman may be recovered from her alone (Ill. Rev. Stat. 1975, ch. 68, par. 4), it does not follow that a husband and wife cannot conspire together to commit a tort or jointly commit a tort. 21 Illinois Law and Practice, *Husband & Wife* §210.

IV.

Dr. Berlin has cross-appealed from the dismissal of Count II against Mr. Nathan for barratry. We agree with Dr. Berlin that under certain circumstances an action in tort might lie against a common barrator. After all, it is clear

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the court upheld a complaint by a physician who allegedly had never treated the deceased directly or indirectly during the fatal illness and who had been sued as a discovery device in order to ascertain where responsibility could be placed. No such flagrant and deliberate abuse of the legal system has been alleged here.

that at common law an action in tort could be brought against one guilty of maintenance (see for example *Fletcher* v. *Ellis* (Territory of Ark. 1836), 9 F. Cas. 266 (No. 4,863a); *Goodyear* v. *Dental Vulcanite Co.* v. *White* (C.C. S.D.N.Y. 1879), 10 F. Cas. 752 (No. 5,602)), and we see no reason why the same rules should not apply to common barratry. But we agree with the trial court that no action for common barratry could lie under the situation present in the instant case.

At common law, barratry or common barratry was defined as the offense of frequently exciting or stirring up suits and quarrels between others. Barratry did not consist of a single act but of several acts, and it has been stated that at common law at least three acts of a barratrous nature were necessary to commit the offense. (*Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 823, 14 Ill. Dec. 489, 372 N.E.2d 685; *State* v. *Noell* (1927), 220 Mo. App. 883, 295 S.W. 529; 14 Am. Jur. 2d *Champerty and Maintenance* §19.) It is the general practice and not the particular act which constitutes the crime of common barratry. (*Commonwealth* v. *Pray* (1832), 30 Mass. (13 Pick) 359.) Here even if the conduct of Mr. Nathan could be considered to constitute the stirring up of a single suit or quarrel, it alone was insufficient to constitute common barratry.

Furthermore, as pointed out in *Vitaphone Corporation* v. *Hutchinson Amusement Co.* (D. Mass. 1939), 28 F. Supp. 526 at 530:

> "* * * Blackstone described a barrator in volume 4, p. 125, as 'those pests of civil society that are perpetually endeavoring to disturb the repose of their neighbors and are officiously interfering in other men's quarrels.

> • • •' Assuming barratry still to be an offense in Maine and Massachusetts, where the activities complained of here took place, it would be difficult to suppose that the vexatious person or collection of persons that are called common barrators can be found to exist under the above described circumstances. There was no purpose on the part of either the distributors or the Bureau to foment suits in order to oppress persons. *Commonwealth* v. *McCulloch*, 15 Mass. 227. And, surely, the definition in Blackstone cannot fit persons engaged in protecting their legitimate business enterprises.''

We do not believe that this definition can apply to a person trying to protect his legitimate domestic enterprise, that is, his family, any more than it can to one protecting a legitimate business enterprise. Compare also *Milk Dealers Bottle Exchange* v. *Schaffer* (1922), 224 Ill. App. 411.

Dr. Berlin, however, argues that the codification of the offense into statutory form has abolished the common law offense. Ill. Rev. Stat. 1975, ch. 13, par. 21 reads as follows:

> ''If any person shall wickedly and wilfully excite and stir up any suits or quarrels between the people of this state, either at law or otherwise, with a view to promote strife and contention, he shall be deemed guilty of the petty offense of common barratry; and if he be an attorney or counselor at law, he shall be suspended from the practice of his profession, for any time not exceeding six months.''

Even if we were to agree with the plaintiff that the statute has abolished the common law offense, an issue we do not rule on, we cannot agree with the plaintiff that a single action runs afoul of the statute. If a statute is enacted which covers an area formerly covered by common law, such statute must be construed as adopting common law unless

there is clear and specific language showing that change in the common law was intended by the legislature. (*Proud* v. *W. S. Bills & Sons, Inc.* (1970), 119 Ill. App. 2d 33, 255 N.E. 2d 64, *leave to appeal denied.*) There is no clear and specific language in the statute indicating that it was intended to be more restrictive than common law. While the statute does refer to ***any*** suits or quarrels, we do not believe that the word ''any'' clearly indicates that the stirring up of a single suit or quarrel is sufficient since the statute refers to suits or quarrels in the plural. It is still the law in Illinois that the laws against champerty, maintenance and barratry are aimed at the prevention of multitudinous and useless lawsuits and at the prevention of speculation in lawsuits. *Milk Dealers Bottle Exchange* v. *Schaffer* (1922), 224 Ill. App. 411.

Furthermore, we note that the trend in the law has not been toward a more rigorous application of the laws against barratry, champerty and maintenance, but the converse. As the court in *Milk Dealers Bottle Exchange* v. *Schaffer* (1922), 224 Ill. App. 411 pointed out at p. 415:

> ''While the common-law crime of champerty has not been abolished by statute in this State, the tendency of decisions is to depart from the severity of the old law and at the same time to preserve the principle which tends to defeat the mischief to which the old law was directed, namely, 'the traffic of merchandizing in quarrels, of huckstering in litigious discord.' ''

Additionally, it is noted in 14 Am. Jur. 2d *Champerty and Maintenance,* §1, p. 842:

> ''The doctrines of champerty and maintenance, as known to the common law, arose at an early day in England from causes peculiar to the state of society

then existing. Out of the conditions then existing arose the common law rule which prohibited the assignment of choses in action and the sale and transfer of land held adversely. The progress of law, enlightenment, and civilization during the past few hundred years has, however, to a large extent obviated the necessity of the stringent rules. In none of the states are the doctrines of laws or champerty and maintenance preserved in their original rigor. In many states they are declared to be obsolete and to have no existence at all; in others they are preserved in a greatly modified form, usually by special statutes. Generally, choses of action are now assignable, and land held adversely may be sold and transferred. Considering the status of society and conditions now prevailing in this country, to transfer a right of action or to maintain the suit of another without having any direct or contingent interest in it will by no means necessarily produce mischief or oppression. Indeed, it may be that such assistance or maintenance will have a tendency to secure rights and promote the ends of justice."

Indeed, we doubt the constitutionality of any statute which could be considered to bar the giving of unsolicited advice by one person to another, without charge, that that person may have a remedy at law and should peruse it, where the first person is not, as was the case in *Ohralik* v. *Ohio State Bar Assn.* (1978), ... U.S. ....., 56 L. Ed.2d 444, 98 S. Ct. 1912, attempting to obtain remunerative employment for himself as legal counsel. As Mr. Justice Marshall remarked in his concurring opinion in that case, at ..... U.S. ....., 56 L. Ed.2d 464, 98 S. Ct. at 1928:

> "The provision of such information about legal rights and remedies is an important function, even where the rights and remedies are of a private and commercial nature involving no constitutional or political overtones. See *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 221-223 (1967). See also *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 585 (1971)."

And as was pointed out in *In re Primus* (1978), ... U.S. ....., 56 L. Ed.2d 417, at 434, 98 S. Ct. 1893, at 1904, 1905:

> "The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights.' *Button*, 371 U.S. at 437, including 'advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys * * * for assistance,'" *id.*, at 434.

While it is true that both *Primus* and *NAACP* v. *Button* (1963), 371 U.S. 415, 9 L. Ed.2d 405, 83 S. Ct. 328 were cases involving "constitutional and political overtones" and that the court in both distinguished the cases involving private litigation for private gain, serving no public interest, we suspect that the providing of information about legal rights may be on occasion constitutionally protected even where merely private and commercial rights are involved. However, that question is not before us in this case, since, while the defendant, Mr. Nathan, raised the issue in his answer, he has waived it by not raising it on appeal. *Berk* v. *Will County* (1966), 34 Ill. 2d 588, 218 N.E.2d 98; Ill. Rev. Stat. 1977, ch. 110A, par. 341(e)(7).

(Appellate Court Opinion)

For the reasons previously discussed in this opinion, the judgment of the trial court in favor of Dr. Berlin is reversed and the case is remanded for the entry of an order dismissing the plaintiff's complaint. The judgment on the cross-appeal is affirmed.

REVERSED IN PART AND REMANDED.

AFFIRMED IN PART.

JOHNSON, P.J. and DIERINGER, J., concur.

APPENDIX B

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706

January 25, 1979

Mr. Wayne B. Giampietro
Attorney at Law
Lightenberg, DeJong, Poltrock
& Giampietro
134 North LaSalle Street
Suite 1100
Chicago, IL 60602

No. 51367—Leonard Berlin, petitioner, vs. Gilbert Nathan, et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX C

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706

March 14, 1979

Ligtenberg, DeJong, Poltrock
& Giampietro
Attorneys at Law
134 N. LaSalle Street
Suite 1100
Chicago, IL 60602

In re: Leonard Berlin, petitioner, vs. Gilbert Nathan, et al., respondents. No. 51367

Gentlemen:

The Supreme Court today made the following announcement concerning the above entitled cause:

> The motion by petitioner for reconsideration and to vacate the order denying petition for appeal as a matter of right is denied.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

78-1631

No. [redacted]

In the
Supreme Court of the United States
October Term, 1978

LEONARD BERLIN,

Petitioner,

vs.

GILBERT NATHAN, HARRIET NATHAN, FRED BENJAMIN and STUART SHAPIRO,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION OF LEONARD BERLIN FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION OF LEONARD BERLIN FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

OPINIONS BELOW

The statement of the opinions and orders of the Appellate Court of Illinois, First District, and the Supreme Court of Illinois are accurately stated. (Pet., p. 4).

JURISDICTIONAL STATEMENT

Respondents contest the jurisdictional statement of petitioner in view of their contention that no question under the Constitution of the United States arose in and as a result of the decision of the Appellate Court of Illinois. Implicit in the decision of the Supreme Court of Illinois

in denying petitioner's petition for an appeal as a matter of right under Rule 317 of the Rules of the Supreme Court of Illinois (ch. 110A, sec. 317, Ill. Rev. Stat.) is that no such constitutional question arose.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution in pertinent part provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ch. 110, sec. 41, Ill. Rev. Stat. (1977), provides:

> Allegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal.
>
> The State of Illinois or any agency thereof shall be subject to the provisions of this Section in the same manner as any other party.
>
> Where the litigation involves review of a determination of an admistrative agency, the court shall include in its award for expenses an amount to compensate a party for costs actually incurred by that party in contesting on the administrative level an allegation or denial made by the State without reasonable cause and found to be untrue.

> Amended by P.A. 79-1434, § 8, eff. Sept. 19, 1976; P.A. 80-1097, § 2, eff. Nov. 23, 1977.

QUESTION PRESENTED FOR REVIEW

Whether the doctor—petitioner can claim a violation of rights under the Fourteenth Amendment where the State court refuses to recognize his claim to a new remedy against his patient, his patient's husband and his patient's attorneys for bringing an allegedly groundless malpractice suit against him.

STATEMENT OF THE CASE

This is a cause of action brought by petitioner, Dr. Leonard Berlin (hereafter at times "petitioner" or "Dr. Berlin") against respondents, Harriet Nathan (a former patient of Dr. Berlin who caused a medical malpractice suit to be brought against him, and who will be referred to at times as "Harriet"), Gilbert Nathan (an attorney and Harriet's husband, referred herein at times as "Gilbert"), and Fred Benjamin and Stuart Shapiro (attorneys in the firm of Benjamin and Shapiro who represented Harriet in the underlying medical malpractice lawsuit against Dr. Berlin, who will be referred to at times as "Benjamin" or "Shapiro" or collectively as "the attorneys"). This case was tried before a jury which rendered a verdict in the amount $2,000.00 compensatory damages and $6,000.00 punitive damages against all defendants. Following the denial of timely post-trial motions, the defendants appealed to the Appellate Court of Illinois, First District.

By unanimous decision, the Appellate Court reversed the judgment entered by the trial court and remanded the cause for the entry of an order dismissing the petitioner's complaint. (Pet. App. 1a-26a).

Petitioner sought to have the Appellate Court's decision reviewed in the Supreme Court of Illinois, bail but that Court denied his petition (Pet. App. 27a), and denied a motion for reconsideration of its decision. (Pet. App. 28a).

SUMMARY OF THE ARGUMENT

It is the contention of respondents that the Appellate Court of Illinois properly refused to recognize a common law or constitutional right of action by a physician against his former patient and her husband and her attorneys for negligence or wilful and wanton misconduct in the filing of a medical malpractice suit against him. Petitioner refused to seek existing remedies (e.g., a suit for malicious presecution or a recovery under section 41 of the Civil Practice Act, ch. 110, sec. 41, Ill. Rev. Stat.), opting instead to carve out totally new remedies which, in the last analysis, would virtually dry up access to the courts.

The question presented by petitioner here has been raised on many occasions in various state courts, and as observed by the Appellate Court in its decision: "The plaintiff (petitioner here) has cited no case where an appellate court has upheld a complaint brought by a treating physician against his former patient or if deceased, the patient's family or the patient's attorneys for the bringing of a tort action against the physician where malicious prosecution has not been shown and this court has found none." (Pet. App. 19a, n. 2). See also Annot. 84 A.L.R. 3d 555.

Petitioner's attempt to raise his alleged grievance to a constitutional plane is absurd.

ARGUMENT

I.

THERE IS NO CONSTITUTIONAL QUESTION WHATEVER, LET ALONE A QUESTION OF SUBSTANCE, RAISED IN THIS PETITION.

Paradoxically, petitioner twists logic on its head and contends that the decision of the Appellate Court has "deprived [him] of any meaningful access to the Illinois courts." He reasons from "statistics" that in malicious prosecution suits state appellate courts have "consistently . . . reversed trial courts which sought to provide effective relief to victims of maliciously or frivolously filed lawsuits." He states that appellate courts have "failed to superintend the correction of the proble . . ." and this warrants "the intervention of this Honorable Court to provide a superintending and correcting influence." (Pet., pp. 10-11). This, he says, violates his rights to due process and equal protection under the Fourteenth Amendment.

Respondents do not disagree with the proposition that under certain circumstances a cause of action may exist for the wrongful bringing of civil proceedings. Such an action is related and arose as an adjunct to the action for malicious criminal prosecution. An action for the wrongful bringing of civil proceedings is recognized, however, only when the civil suit is alleged to have been brought without probable cause and with a malicious motive. Prosser, *Law of Torts,* §870, pp. 870-76 (3rd Ed. 1964).

In Illinois, there is neither common law nor statutory authority to sustain the causes of action alleged by the

plaintiff. In *Hill Co.* v. *Contractors Supply Co.,* 249 Ill. 304, 94 N.E. 544 (1911), the Court stated:

> "At common law a person is not liable for bringing any suit, criminal or civil or for causing a seizure of property, if the court had jurisdiction of the subject matter and the parties, unless he acts maliciously and without probable cause." 249 Ill., at 310, 94 N.E. at 546.

One of the cases cited by *Hill* in support of this proposition is *Stewart* v. *Sonneborn,* 98 U.S. 187 (1878), where an action was brought by the plaintiff for an alleged wrongful institution of bankruptcy proceedings against him. In *Stewart,* this Court stated:

> "It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice, or some improper or sinister motive. Malice is essential to the maintenance of any such action and not merely to the recovery of exemplary damages. Notwithstanding what has been said in some decisions of a distinction between actions for criminal prosecutions and civil suits, both classes at the present time require substantially the same elements. Certainly, an action instituting a civil suit requires not less for its maintenance than an action for a malicious prosecution of a criminal proceeding." 98 U.S., at 192. *In accord* 52 Am. Jur. 2d, Malicious Prosecution, §6, p. 190.

This is not a situation where a remedy is unavailable to petitioner for redress of his alleged wrong. Where *no* remedy has existed for a wrong, the courts in Illinois have at times fashioned a remedy. *Skelly Oil Company* v. *Universal Oil Products Company,* 338 Ill. App. 79, 86 N.E.2d 875 (1st Dist. 1949); *Eick* v. *Perk Dog Food Company,* 347 Ill. App. 293, 106 N.E.2d 742 (1st Dist. 1952); *Johnson* v. *Luhman,* 330 Ill. App. 598, 71 N.E.2d 810 (2d Dist. 1947). The remedy presently available to petitioner *in this case* takes the form of Section 41 of the Civil Practice Act which provides:

> "Allegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleasing them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fees to be summarily taxed by the court upon motion within thirty days of the judgment or dismissal." S.H.A., ch. 110, §41 (Supp. 1977).

This section was revised in 1977 to eliminate the words "and not in good faith." With this revision Section 41 has been strengthened to allow more liberal use by the courts.

The extended, thoughtful decision of the Appellate Court of Illinois provides compelling reasons to support its decision, including the truism: "The importance of free access to the courts demands that this access be maintained even though occasionally some innocent person must suffer." (Pet. App. 20a). As outlined in the Appellate Court's decision, every court of review which has addressed this issue, whether in Illinois or in any other State, has uniformly rejected plaintiff's contention. (Pet. App., pp. 19a-20a, and the cases cited therein). Nor has petitioner cited any such authority in his Petition.

The injuries alleged by the plaintiff are damage to reputation, mental anguish, loss of time for defending the malpractice action, and the speculation of increased insurance premiums. These alleged "injuries" are nothing more than the result of being named as a defendant

in a lawsuit. These "injuries", at best, are injuries to reputation arising from the filing of the lawsuit. The allegation regarding increased insurance premiums is entirely speculative in nature as there is no proof or allegation in the plaintiff's complaint of any such present damage or injury. In any event this "injury" is similar to all other defendants named in any lawsuit.

The Appellate Court in its decision repudiated the contention that public policy demands a recognition of this new cause of action. Its conclusion, consistent with *all* other recent decisions on this precise issue, was that expending time, money and suffering anxiety in the defense of the unwarranted and unfounded lawsuit "unfortunately is a price which must necessarily be paid to keep the courts open to the people." (Pet. App., pp. 19a-20a).

Petitioner and the Amicus can recite general principles of constitutional law until they are breathless, and the result is the same. Unless this Court is prepared to usurp the prerogative of State courts to determine common law or statutory rights and remedies in personal injury actions and in the supervision of alleged abuses of the use of judicial process or courts, this petition should be denied.

Finally, respondents will not extend this brief with a contest of the many unsupportable and totally inaccurate statements made in the documents filed in this Court by petitioner and the Amicus, not the least of which is the claimed proliferation of frivolous suits against physicians and hospitals in the delivery of health care. Nor will comment be made upon the egregious trial errors more than 50 alleged to have occurred in the trial of this cause.

We would make the following comment in passing, however:

1. The increase in malpractice claims is due predominately to a recognition by patients of their rights in this area and to a small number of courageous physicians who have agreed to testify in these cases. The mistakes are less often buried these days.

2. The aspect of malpractice claims has led to better medicine by *more* physicians. Defensive medicine means careful medicine. More physicians are doing more reading of medical literature and less in the *Wall Street Journal.*

3. The premium escalation means that premiums are simply rising to a level at which they should have been years ago.

4. The failure to win a major percentage of malpractice claims is more due to the difficulty in establishing a case (the increased burden on plaintiffs) and the undeniable enormous lobbying effort made by physicians and hospitals to "brain wash" prospective jurors against these claims. In each visit or with each bill, a patient receives a diatribe against malpractice claims and the lawyers who bring them, with a statement that the increase in the bill is the result of "frivolous" claims.

CONCLUSION

For the reasons given, respondents respectfully pray that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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No. 78-1631

In the Supreme Court of the United States

OCTOBER TERM, 1978

LEONARD BERLIN,

Petitioner,

vs.

GILBERT NATHAN, HARRIET NATHAN, FRED BENJAMIN and STUART SHAPIRO,

Respondents.

BRIEF OF THE CHICAGO MEDICAL SOCIETY, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Regulations

Other Authorities

In the Supreme Court of the United States

OCTOBER TERM, 1978

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The Chicago Medical Society files the following amicus brief in support of the Petition for Writ of Certiorari sought by Leonard Berlin. Amicus curiae has filed letters with the Clerk from all parties granting consent to the filing of this brief.

INTEREST OF AMICUS

The amicus curiae has an interest in the present case for two reasons:

1. The decision of the Illinois Appellate Court denies the members of the Chicago Medical Society, of which Dr. Berlin is a member, any effective remedy for injury inflicted by frivolous litigation; and

2. The decision will exacerbate the already severe malpractice crisis in Illinois and elsewhere in the country, increasing the likelihood that members of the Society will be involved in a frivolous claim and encouraging the growth of already inflated medical malpractice premiums, to the economic and social detriment of the patient.

STATEMENT OF THE CASE

Dr. Leonard Berlin is a Board-certified radiologist. In October 1973, he reviewed and interpreted X-rays taken of Mrs. Harriet Nathan's dislocated finger. Mrs. Nathan was thereafter treated by other doctors.

Some months later, Mrs. Nathan's husband, an attorney, telephoned Dr. Berlin and told him that he would be named as a co-defendant in a malpractice suit which he was about to bring against one of the physicians who had treated his wife.

In October 1975, defendant-respondents Fred Benjamin and Stuart Shapiro filed a medical malpractice suit in the Circuit Court of Cook County, on behalf of Mrs. Nathan, against Dr. Berlin, Dr. William Meltzer and Skokie Valley Community Hospital. Prior to the preparation of the filing of that suit, Mrs. Nathan's attorneys did not contact any of the physicians who had treated Mrs. Nathan,

nor did they attempt to do so. Moreover, at the trial of this cause, attorney Benjamin admitted that he had filed the complaint against Dr. Berlin without having acquired any evidence or information to support the allegations of medical malpractice that were made against Dr. Berlin in the complaint. Likewise, Mrs. Nathan admitted that the physicians whom she had subsequently engaged had never suggested that Dr. Berlin's services had been improper in any way.

On October 22, 1975, shortly after the filing of Mrs. Nathan's lawsuit, Dr. Berlin filed suit against respondents in the Circuit Court of Cook County, which consolidated that suit with Mrs. Nathan's medical malpractice action. On the date set for trial, Mrs. Nathan voluntarily dismissed her suit. Dr. Berlin's amended complaint was then tried to a jury, which returned a verdict in his favor, awarding him Two Thousand Dollars ($2,000) actual damages and Six Thousand Dollars ($6,000) punitive damages. In response to special interrogatories, the jury found that each of the defendants had been guilty of willful and wanton conduct in filing their suit against Dr. Berlin.

The Illinois Appellate Court reversed, holding that Dr. Berlin should have brought a common law action for malicious prosecution. The Appellate Court made no reference whatsoever to the facts adduced at the trial, but relied solely on the pleadings, holding that Dr. Berlin had not stated a cause of action. The Appellate Court further held that, in order to plead such a cause of action, it must be alleged that (a) the plaintiff in the prior suit had acted maliciously and without probable cause, (b) the prior suit had terminated in favor of the defendant therein (that is, the plaintiff in the subsequent action such as the case at bar), and (c) the latter must be shown to have suffered "special injury" of a kind not necessarily found in any and

all suits prosecuted to recover for like causes of action. Applying these highly restrictive and ancient common law standards, the Appellate Court held that Dr. Berlin had failed to plead that the prior cause had terminated in his favor (since instead it had been dismissed by Mrs. Nathan) or to plead that he had suffered "special injury." Notwithstanding the fact that petitioner had pleaded that respondents had charged and alleged professional malpractice in their complaint against him "with reckless disregard as to [their] truth or falsity," the Appellate Court held that such pleading was not sufficient to allege "malice."

Dr. Berlin filed his Petition for Leave to Appeal to the Illinois Supreme Court, and that Petition was denied. Dr. Berlin moved for reconsideration, and that Motion was also denied.

REASONS FOR GRANTING THE WRIT

In reversing the jury verdict against the defendants for bringing their malpractice suit in a willful and wanton manner, the Illinois Appellate Court denied Dr. Berlin, and other similarly situated physicians and surgeons, an effective redress for an actual proven injury, thus denying him due process of law and raising certain constitutional issues which the Illinois Supreme Court was obligated, but refused, to hear. In addition, the Illinois Appellate Court's decision will aid and abet the filing of baseless suits and thereby worsen the already severe malpractice crisis in the United States.

I.

THE RULING OF THE ILLINOIS APPELLATE COURT CONSTITUTED A DENIAL OF DUE PROCESS, REQUIRING THAT THE ILLINOIS SUPREME COURT HEAR THE CASE.

A. The Due Process Clause Of The Fourteenth Amendment Requires That The States Provide Some Remedy To Those Who Have Suffered Injury To Their Liberty And Property.

This Court has long recognized that the right to due process reflects a fundamental belief that society should provide an orderly means for the redress of grievances. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), *Schroeder* v. *City of New York*, 371 U.S. 208 (1962). Indeed, our political and social institutions are premised on the view that civil society exists so that rights and responsibilities can be allocated according to law and disputes may be

settled without resort to violent means. Justice Harlan articulated this theory:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts, individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. *Boddie* v. *Connecticut*, 401 U.S. 371, 374 (1971).

Recognition of the importance to society of an orderly resolution of disputes suggests that the right to recover damages for a wrong committed against a member of society is "fundamental." As the Court recognized in *Schroeder* v. *City of New York*, 371 U.S. 209, 212 (1962), the right to be heard is "one of the most fundamental requisites of due process." Furthermore, the right to a remedy is meaningless unless it provides for the vindication of rights in the courts or some quasi-judicial body. *Boddie* v. *Connecticut*, 401 U.S. 371, 374 (1971). The failure to provide any effective remedy through one of these bodies for a wrong recognized by society violates basic values "implicit in the concept of ordered liberty" [*Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)], and therefore constitutes a denial of due process of law.

In protecting this right, this Court has always carefully scrutinized cases where the state has sought to remove a common law remedy by legislation. In *New York Central R. Co.* v. *White*, 243 U.S. 188 (1917), this Court reviewed the constitutionality of a New York workman's compensation statute which denied a common law suit to both employer and employees in return for a regularized compensation schedule. The Court recognized that it had to determine whether "the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice." *Id.* at 202. While not ruling directly on the issue, the Court "doubted whether the State could abolish all rights of action . . . without setting up something adequate in their stead." *Id.* at 201. Since the Court found that New York had provided an adequate substitute, there was no reason to reach the due process issue.

The Court faced a similar issue just last term in deciding *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 98 S. Ct. 2620 (1978). In *Duke Power*, appellees challenged the constitutionality of the Price Anderson Act. That Act sets a maximum limitation on liability for nuclear accidents resulting from the operation of a privately-owned but federally-funded nuclear power plant. In return, the power companies indemnified under the Act are required to waive all legal defenses in the event of an accident. *Id.* at 2626. The Act also obligated Congress to "take whatever action is deemed necessary and appropriate to protect the public" from the consequences of a nuclear accident. *Id.* at 2626. As in *White*, this Court found that it was unnecessary to confront directly the question whether the government must provide an adequate substitute for the common law remedy that had been extinguished. However, the Court did emphasize that the "assurance" of a $560 million fund and the waiver of defenses were "a fair and reasonable substitute" for the common law remedy. *Id.* at 2640.

The emphasis on the *quid pro quo* element found in both *White* and *Duke Power* suggests that the state must provide *some* remedy for a wrong inflicted on one who suffers an actual injury. Any "arbitrary or unreasonable" failure to provide compensation for such damage constitutes a denial of due process of law.

B. In Defending Himself Against A Baseless Malpractice Suit, Dr. Berlin Incurred Substantial Damages Which He Was Entitled To Recover From The Defendant.

A physician or surgeon who is required to defend himself against a baseless malpractice claim necessarily incurs substantial damages. First, malpractice suits damage a physician's reputation. The mere filing of a claim often brings unfavorable publicity and questions regarding the physician's competence and ethical standards. Moreover, the damage often persists even if the physician is ultimately successful in defending the action. Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions,* 45 Fordham L. Rev. 1004, 1015 (1977).

The Court has recognized that the right to maintain one's reputation is a "fundamental personal right." *Shelton* v. *Tucker,* 364 U.S. 479, 489 (1960). While the Court's previous decisions in the privacy area have chiefly concerned marriage, procreation, family relationships and child raising, *Roe* v. *Wade,* 410 U.S. 113, 152 (1973), the Court has also recognized that privacy generally protects the "right to be let alone." *Doe* v. *Bolton,* 410 U.S. 179, 213 (1973) (Douglas J., concurring) citing, *Olmstead* v. *United States,* 277 U.S. 438, 478 (1928) (Holmes, J., dissenting). In *Rosenblatt* v. *Baer,* 383 U.S. 75, 92 (1966), Justice Stewart articulated society's interest in protecting reputation:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less

> recognition by this Court as a basic of our constitutional system.

Since, as this Court recognizes, the right to protect one's reputation lies at the heart of a system of ordered liberty, due process requires that the state provide individuals with a means of protecting themselves against groundless attacks against their reputation.

Closely related to damage to reputation is the infliction of severe emotional distress. Birnbaum, *supra,* at 1015. The physician or surgeon who is the object of a frivolous malpractice suit often feels intense frustration and anxiety. In some cases such suits have led physicians to change their attitudes regarding their professional practice and even their outlook on life. Report of the Secretary's Commission on Medical Malpractice, Department of Health, Education and Welfare, January 16, 1973, DHEW Publication (O.S.) 73-88, at 12 (hereinafter cited as HEW Report). In addition, the physician has to spend a large amount of time and energy helping to prepare his defense. This effort is most often contributed at the expense of his professional practice. Birnbaum, *supra,* at 1015.

Finally, the filing of a groundless claim often results in an increase in the physician's malpractice insurance premiums regardless of the outcome of the suit. In Illinois, for instance, the mere filing of a suit may subject the physician to surcharges or coverage restrictions if the defendant is insured under the Illinois State Medical Inter-Insurance Exchange (ISMIE). If the defendant is insured by the other major malpractice insurers, the Medical Protective Company, he incurs a 30% to 50% surcharge on his annual premium whenever a new suit is filed against him.

C. The Holding Of The Illinois Appellate Court, In Denying Dr. Berlin Any Effective Remedy, Constituted A Denial Of Due Process And Made It Necessary That The Illinois Supreme Court Hear The Case.

The holding of the Illinois Appellate Court so restricted the grounds for bringing a suit against one who brings a groundless claim as to effectively deny Dr. Berlin any remedy. In reversing the jury verdict in favor of Dr. Berlin, the court concluded that the only remedy for the victim of a groundless claim is an action for malicious prosecution. In this case, the court concluded Dr. Berlin had no remedy because he had failed to meet the requirements for bringing such an action. In particular, Dr. Berlin did not demonstrate that the action terminated in his favor or that he incurred special damages.

The requirements suggested by the Illinois Appellate Court make it almost impossible for any physician—or other professional person—to bring a suit for malicious prosecution. The requirement that the action terminate in the defendant's favor means that the plaintiff can always trade on the nuisance value of his frivolous suit and, if he is unsuccessful in exacting his nuisance settlement, he can frustrate a physician's countersuit by finally dismissing his claim with prejudice—the exact course of events in Dr. Berlin's case. More importantly, courts have generally found special damages in a malicious prosecution action only when there is an arrest, an attachment, an appointment of a receiver, a writ of replevin, or an injunction. Birnbaum, *supra*, at 1021. Yet these events almost never occur in a malpractice action. As one commentator has stated:

> In jurisdictions that continue to apply the strict requirement of proof of special injury, the physician's ability to assert a cause of action for malicious prosecution is illusory, in most cases, because the patient's suit against a physician for malpractice does not usually involve a civil arrest of the physician, seizure of the physician's property or any recognized special injury to the physician which would not ordinarily result in all suits prosecuted for like causes of action. Birnbaum, *supra*, at 1021, n. 120.

Furthermore, the Illinois Appellate Court's suggestion that section 41 of the Civil Practice Act, Ill. Rev. Stat. 1977, ch. 110, § 41, provides an adequate remedy for Dr. Berlin misconceives both the nature and purpose of the section. Section 41 provides that the defendant can recover attorney's fees and expenses in the original action if the allegations made against him were without probable cause. Yet those costs are wholly inadequate to compensate the victim of a baseless claim, since they fail to provide for damage to reputation or business practice and infliction of emotional distress. Birnbaum, *supra*, at 1022. Recognizing this limitation, the Illinois courts have concluded that the section is not intended to prevent frivolous or vexatious law suits. *Sarelas* v. *Alexander*, 132 Ill. App.2d 380, 270 N.E. 2d 558 (1971).

This Court has recognized that the action of a state court in enforcing a substantive common law rule "may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process." *Shelley* v. *Kraemer*, 334 U.S. 1, 17 (1948). The action of the Illinois Appellate Court represents just such a case. In concluding that the only remedy for the victim of a baseless claim is an illusory common law remedy, the Court denied Dr. Berlin any redress through orderly means for the wrong done against him. Since the touchstone of our legal system is the right to recover for acknowledged wrongs, the action constituted a denial of due process.

The due process issue raised by the Appellate Court's action requires that the Illinois Supreme Court hear the case. Article VI, § 4(c) of the Illinois Constitution of 1970 grants an appeal as of right if there is a question under the United States Constitution which arises for the first time in and as a result of the action of the Illinois Appellate Court. This Court should accordingly remand the case to the Illinois Supreme Court with instructions to hear the case. In addition, it should direct the Illinois Supreme Court to consider whether the remedies provided under state law in the circumstances of this case meet the requirements of the due process clause.

The Illinois Appellate Court, in attempting to vindicate the critical right of access to the courts for those wronged in our society, has effectively denied that right to a particular segment of our society desperately in need of such assistance. In so doing, they have created an unconditional right on the part of plaintiffs and their attorneys to bring vexatious and frivolous lawsuits which damage the physician's reputation and other legitimate interests while providing no concurrent benefit to society. This Court should act to remedy that situation by granting the Writ.

II.

THE INCREASING VOLUME OF FRIVOLOUS LITIGATION, WHICH EXACERBATES THE EXISTING MALPRACTICE CRISIS IN THIS COUNTRY, MAKES IT IMPERATIVE THAT THIS COURT GRANT THE WRIT.

The Illinois Appellate Court's ruling will have a profound effect on the medical malpractice crisis in this country. By denying doctors the only weapon available to them in most cases to counter baseless suits, the Illinois Appellate Court's ruling will encourage plaintiffs to file claims for their *in terrorem* settlement potential. These

additional claims will only increase the damage the malpractice crisis has already done to the health care delivery system in this country.

The malpractice crisis is reflected in the increasing number of suits brought for malpractice claims. In 1969, the major medical malpractice insurer had one claim pending for every 23 physicians it insured. By 1974, the ratio was one claim for every ten physicians. Epstein, *Medical Malpractice: The Case for Contract*, 1976 American Bar Foundation Journal 87, 88 n. 1. In New York, the number of malpractice suits against physicians rose from 564 in 1970 to 1200 in 1974. *Id.*

This upswing is also reflected in suits brought against members of the Chicago Medical Society. In one fourteen month period from January 1974 to March 1975, 1010 of Cook County's 7100 physicians were sued for malpractice. *Id.* Although the number of suits levelled off somewhat after 1975, there recently has been another surge in the number of suits brought. In the first six months of 1979, malpractice suits in Cook County have increased 32.9% over the same period in 1978. Cook County Jury Reporter, July 13, 1979.

The increase in litigation has led, in part, to dramatic increases in malpractice insurance premiums. Between 1960 and 1970, premiums for dentists rose 115%; those for hospitals, 262.7%; those for physicians other than surgeons, 540.8%; and those for surgeons, 949.2%. HEW Report, *supra*, at 13. The increases have continued into the 1970's. The average malpractice insurance premium rose from $1905 in 1973 to $7787 in 1975. Birnbaum, *supra*, at 1016. Between 1970 and 1975, the Illinois State Medical Society insurance program made a sevenfold increase in premiums for high risk physicians and surgeons. Epstein, *supra*, at 87 n. 1. Hospital insurance rates in Illinois

jumped 561% in 1975 alone, bringing the average premium per hospital bed to $1511 per year. *Id.*

In many instances, malpractice insurers have cancelled or substantially altered their policies so as to reduce coverage. One insurer dropped its New York coverage, while another cancelled the policies of 2000 doctors in Los Angeles. The nation's largest insurer changed from an "occurrence" policy to a "claims made" policy for all new insurance contracts made after July 1, 1975. The former coverage protects the physician against all suits which occur as a result of his or her practice. The claims made policy only protects the physician against those suits which are filed during the year of coverage, with an option to purchase for later years. While premiums under the claims made policy are lower than under an occurrence policy for new physicians, the premiums rapidly increase as the doctor accumulates experience and the chances increase that a former patient will bring suit. Moreover, retired physicians must buy insurance to protect themselves against claims which arise after they stop practicing. Epstein, *supra,* at 89 n. 5.

The malpractice crisis has had a profound impact on the delivery of health care in this country. First, it has contributed to the spiraling costs already found in the medical care area. Physicians necessarily have passed on 80 to 90% of the cost of malpractice insurance to the patient. One study indicated that physicians had raised their fees 96 cents per patient over a two year period to cover malpractice insurance costs. Birnbaum, *supra,* at 1016 n. 91. More fundamentally, the malpractice crises has changed the way that physicians practice. This phenomenon is generally referred to as "defensive medicine." "Positive" defensive medicine is the practice of conducting tests or diagnostic procedures which may not be medically justified but are ordered to defend against any

possible liability. "Negative" defensive medicine occurs when a physician does not conduct a test or procedure, even though it may be beneficial for the client, because he fears the possible liability arising from it. HEW Report, *supra,* at 14-15. Both practices appear to be increasing. In addition, physicians have demonstrated reluctance in using specially trained allied health care personnel, including technicians and nurses, because they fear the risks of increased liability arising from the harmful acts of their assistants. HEW Report, *supra,* at 17. Without question, defensive medicine leads to increased health care costs.

It appears that groundless or baseless malpractice claims play a key role in creating this situation. Such claims usually fall into three categories. First, there are claims brought solely as a result of a patient's spite or ill will. Second, there are claims brought by a patient in response to an unpaid bill. The client seeks to convince the physician to reduce or forego payment rather than having to report the claim to his insurance company and risk an increase in rates or outright cancellation of coverage. Finally, there are claims where the plaintiff seeks to force a settlement from the physician's insurance carrier for the nuisance value of defending the suit. Birnbaum, *supra,* at 1016-18.

There is substantial evidence that many malpractice claims fit into one of these categories. In one study conducted by the Department of Health, Education and Welfare, plaintiffs' lawyers were asked what percentage of malpractice claims had some merit. They responded that only 33.5% of such claims involved actual malpractice. HEW Report, *supra,* at Appendix 100-01. Another indication of the rise in groundless claims is that the number of suits which have been "marked off"—suits where there has been no activity by the plaintiff's attorney for a substantial amount of time, and therefore are more likely to be

baseless—has been increasing since 1970. Birnbaum, *supra*, at 1009. Finally, one study of insurance records revealed that 25% of all claims were closed without any payment. HEW Report, *supra*, at 10. This is particularly revealing in view of the propensity of insurance companies to settle claims rather than take them to trial.

One powerful means of reducing such baseless claims is to subject their progenitors to the risk of substantial damages. Such actions do not discourage plaintiffs with legitimate claims since the physician still must demonstrate that the action was without probable cause. Yet the Illinois Appellate Court has denied physicians any effective means of deterring such frivolous suits. In so doing, they have made physicians an inviting target for groundless claims, with the hope of nuisance settlement. Such action can only lead to a continuing increase in the number of malpractice suits with a concomitant decline in the delivery of health care services or increase in health care costs in this country. This situation makes it imperative that the Court issue a writ in this case.

CONCLUSION

The refusal of the Illinois Supreme Court to hear Dr. Berlin's case has denied him due process by removing the only available remedy for the wrong done to him by respondents. That denial will affect the entire medical profession by encouraging the filing of vexatious and unfounded lawsuits against physicians and surgeons who will necessarily have to expend considerable time and effort defending themselves. To the extent that physicians and surgeons will be diverted from their principal occupation of providing this nation with first-class medical care, the public will suffer through decreased availability of medical services and increased costs resulting from skyrocketing

malpractice premiums. Further, the increased burden on the judicial system of having to weed out unjustified litigation cannot be overlooked. For all these reasons, amicus curiae respectfully prays that this Honorable Court grant petitioner's request for a writ of certiorari.

Respectfully submitted,

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Dated: August 2, 1979

IN THE

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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CONSENT OF THE PARTIES

Amici are filing this Brief in support of the Petition for a Writ of Certiorari to the Supreme Court of Illinois with the consent of all parties, whose letters of consent have been filed with the Clerk.

INTEREST OF AMICI CURIAE

The American Medical Association (A.M.A.), founded in 1847, is the nation's largest organization of licensed physicians and the principal spokesman for the medical profession in the United States. The A.M.A. is a federation of nearly 2000 state and local medical societies, with a membership of approximately 211,000 individual physicians practicing medicine throughout the United States.

The American Hospital Association, founded in 1898, is a nationwide organization with more than 6,500 member hospitals and health care institutions, as well as more than 29,000 individual members. A majority of the nation's hospitals are members of the Association.

The Illinois State Medical Society represents approximately 14,200 member physicians licensed to practice medicine in the State of Illinois. The other Amici are nationwide organizations whose members are licensed physicians practicing a particular medical specialty.

Amici have an interest in this case because the lower court's ruling effectively denies their members, and all other defendants, any recourse against persons who deliberately and maliciously bring a groundless lawsuit against them. Amici's members, as well as the patients and the health care system they strive to serve, are seriously threatened by the present epidemic of frivolous malpractice claims. Thus, Amici have a vital interest in seeing that a reasonable counterweight to these frivolous, bad-faith claims is maintained.

STATEMENT OF THE CASE

Harriet Nathan, one of Respondents herein, filed a malpractice action in the Circuit Court for Cook County, Illinois, against Petitioner, a Board-certified Radiologist,

and two other defendants. Mrs. Nathan alleged negligent diagnosis and treatment of an injury to her little finger, and she sought $125,000 in damages. In a separate action, Petitioner filed a malicious prosecution claim against Mrs. Nathan, her husband and her attorneys, alleging, in part, that the Nathan suit was groundless and willfully and wantonly brought with reckless disregard as to the truth or falsity of the allegations. *See* Petition for Writ of Certiorari ("Pet.") at 2, 7-8.

On the date set for trial, Mrs. Nathan voluntarily dismissed her malpractice suit against all defendants. Petitioner's suit, which had been consolidated with the Nathan suit, was then tried before a jury, which returned a verdict in Petitioner's favor, awarding him $2,000 actual damages and $6,000 punitive damages. In addition, the jury answered special interrogatories, finding that the Respondents had brought suit in a willful and wanton manner, without any probable cause to support their allegations. *See* Pet. at 2, 8.

On appeal, the Illinois Appellate Court reversed, holding that Petitioner's amended complaint and the instructions under which the case was submitted to the jury were insufficient to state a cause of action for malicious prosecution. The court ruled, *inter alia*, that Petitioner's complaint was deficient as a matter of law because it failed to allege some special injury, such as seizure of person or property, not necessarily occurring in other suits prosecuted maliciously and without probable cause. *See* Pet. at 2, 8-9.

The Illinois Supreme Court denied leave to appeal from that ruling, and Petitioner has petitioned this Court for a Writ of Certiorari to review the constitutional issues raised by the decision below. *See* Pet. at 2-3, 9.

SUMMARY OF ARGUMENT

The decision below reversed a trial court judgment awarding damages to Petitioner as a result of the malicious prosecution by Respondents of a malpractice claim which the trial jury found had been totally groundless and brought in a willful and wanton manner. The appellate court ruled that absent "special damages"—such as seizure of a defendant's person or property before suit—the general policy of encouraging access to the courts bars any recovery for even the most frivolous and malicious claims. Amici will show in this Brief that the ruling below ignores the very serious problems for the nation's health care system and for the courts resulting from the tremendous explosion in recent years in the number of frivolous malpractice suits filed in order to harass physicians or to extort nuisance settlements from physicians and their insurers.

The number of medical malpractice claims filed each year has increased enormously during the past decade. Between 1970 and 1975 the number of suits filed doubled to more than 20,000 per year. In Southern California by 1974 the annual number of claims per 100 physicians had increased to 26, and the figure is in all probability even higher today.

All of the major studies have found that no payment is made to the plaintiff in more than one-half of these malpractice cases, and of those claims actually determined on their merits at trial, the defendant wins 80 to 90 percent of them. However, since medical malpractice cases take longer and are more costly to defend than other personal injury cases, there is substantial pressure on the physicians and their insurers to settle these nuisance claims. Thus, payments are often made in nonmeritorious, and even frivolous, cases.

The dramatic increase in the number of actions has caused the cost of medical malpractice insurance to skyrocket. Notwithstanding increased premiums for surgeons between 1960 and 1970 of roughly 950 percent, average additional rate increases in 20 states during 1974 and 1975 alone ranged from 100 to 600 percent. Malpractice insurance for many physicians in high risk categories (*e.g.*, surgeons) now costs more than $30,000 yearly, and in some cases as much as $60,000-$70,000 per year. These escalating premiums have resulted in substantially higher health care costs to the consumer.

The increase in malpractice claims has also had a severe impact on the delivery of health care services. Because of the high cost of insurance, physicians, including many part-time and semi-retired practitioners, have quit medical practice altogether. Other physicians have migrated from geographic areas where premiums are higher, or they have left a high-risk specialty. A recent survey shows that more than one physician in five has altered his or her practice by eliminating some higher-risk procedures to cope with the rising cost of insurance. Given the existing shortages of health care services, each of these developments may seriously threaten the well-being of many patients.

Another major impact on the health care system is the widespread practice of "defensive medicine," where physicians alter their mode of practice to reduce the possibility of being sued for malpractice and to provide a proper defense in the event a lawsuit is brought. This practice adds significantly to the cost of health care and results in the misallocation of scarce medical resources.

Physicians, themselves, suffer serious injury from the filing of even frivolous claims. Since the mere filing of a claim generates adverse publicity, the physician's reputation is damaged, resulting in a direct loss of patients

and income. All physicians are harmed by the tremendous increase in the cost of insurance, and a physician who is sued for malpractice may face large surcharges even though he or she is ultimately vindicated. Moreover, the defense of even a frivolous suit requires a substantial commitment of time and energy by the physician, resulting in an additional loss of income.

Finally, the filing of frivolous malpractice claims has harmed the fair administration of justice. The Court is familiar with the serious problems of congestion and delay which now plague our state and federal courts. Because of the great number of malpractice suits and the length of time that it takes to dispose of them, these suits have contributed significantly to the serious backlogs that threaten the courts' capacity to administer justice.

In view of the very real injury that physicians suffer from the filing of frivolous malpractice claims, the courts have a duty to protect unjustly accused physicians from these claims. The ruling of the court below, however, effectively denies to physicians recourse against totally groundless claims brought for even the most malicious purposes. By requiring a showing of the type of "special damages" specified by the court below, that court has effectively eliminated the remedy altogether for unjustly accused physicians.

The policy of encouraging free access to the courts does not require preservation of the "special damages" requirement. Courts can and must distinguish between frivolous, bad-faith claims, such as the original suit against the Petitioner here, and legitimate claims brought with a proper purpose. The court below ignored this vital distinction and in so doing has contributed to the serious problems discussed in this Brief.

Legitimate claims brought in good faith, even if ultimately unsuccessful, deserve the full protection of the

courts. Suits brought to harass a doctor or to extort a nuisance settlement deserve none of those protections. Courts have a duty to identify frivolous claims and to ensure that they do not interfere with the fair resolution of legitimate controversies. Only in that way will physicians, the court system, and the public itself be properly protected.

ARGUMENT

Petitioner has sufficiently addressed in his Petition for a Writ of Certiorari the factual, procedural and jurisdictional aspects of this case. The Petition does not address fully, however, the lower court ruling's serious implications for the medical profession, the court system and the public. Amici, therefore, will confine themselves to two important points which they believe deserve the Court's concerned attention:

1. Frivolous and vexatious lawsuits, particularly against members of the medical profession, have become a serious and growing threat not only to the proper practice of medicine, and thus to the protection of the public, but also to the fair administration of justice.

2. Courts have increasingly recognized in recent times that they are not helpless in the face of nonmeritorious claims "brought to extort nuisance settlements" (*see Reiter* v. *Sonotone Corp.*, 47 U.S.L.W. 4672, 4676 (U.S., June 11, 1979)), and that plaintiffs can be penalized for asserting such claims without causing any adverse effect on the assertion of legitimate, meritorious claims. That being so, a question of constitutional dimensions is raised when a state, by whatever method, effectively cuts off a defendant's only recourse against totally nonmeritorious claims brought solely for willful and wanton purposes.

Amici will demonstrate in Section I of this Brief that there has been a tremendous increase in the number of medical malpractice actions being filed over the past

decade and that a significant portion of those claims are totally groundless and brought solely for willful and wanton purposes. In Section II of the Brief Amici will show the serious nationwide impacts that have resulted from this development, describing the impacts on the defendant physician, on patients who must pay more for health care, on the health care system generally, and on the courts.

Finally, in Section III of the Brief Amici will discuss the courts' duty to protect the unjustly accused physician and to ensure that an effective remedy is available for this serious problem. Amici will show how the ruling of the court below effectively denies a remedy altogether. In addition, Amici will explain why free access to the courts is not threatened by a remedy against frivolous and bad faith claims, since the courts can and must distinguish between such claims and legitimate controversies.

I. AN ENORMOUS NUMBER OF MEDICAL MALPRACTICE ACTIONS ARE BEING FILED IN THE COURTS EACH YEAR, AND THE EVIDENCE CLEARLY DEMONSTRATES THAT A SIGNIFICANT PORTION OF THESE CLAIMS ARE GROUNDLESS.

A. The Number of Medical Malpractice Claims Has Increased Dramatically During the Past Decade.

Medical malpractice actions such as the claim brought by Respondents in the instant case have been filed in unprecedented numbers in recent years. As early as 1969, during the first congressional study of medical malpractice, Senator Ribicoff's subcommittee found that the number of malpractice suits and claims was "rising sharply" in certain regions of the country and that the situation was "threaten[ing] to become a national

crisis." [1] By 1975 the crisis was fully upon us, as the number of medical malpractice suits being filed had doubled from the 1970 level to more than 20,000 per year and was continuing to increase steadily.[2]

Available studies confirm this dramatic increase in the number of malpractice suits filed in recent years. For example, a study of three counties in Michigan showed a 193 percent increase in medical malpractice suits filed between 1970 and 1974, with an increase of 61 percent between 1973 and 1974.[3] Likewise, in New York the number of new cases increased by 56 percent from 1969 to 1974.[4] In Cook County, Illinois, filings increased 56.7 percent between 1973 and 1974,[5] and 1,010 of the county's 7,100 physicians were sued in the 14-month period beginning January 1, 1974—an average of over 80 complaints a month.[6] It has been estimated that the fre-

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[1] Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations, 91st Cong., 1st Sess., *Medical Malpractice: The Patient Versus the Physician* 1 (Comm. Print 1969) [hereinafter cited as *Ribicoff Study*].

[2] *See, e.g.*, Kisner, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?*, 26 Case W. Res. L. Rev. 653, 654 n.3 (1976) [hereinafter cited as *Kisner*]; Boutin, *The Medical Malpractice Crisis: Is the Medical Review Committee a Viable and Legal Alternative?*, 15 Santa Clara Lawyer 405 (1975) [hereinafter cited as *Boutin*]; Shapiro, *Medical Malpractice: History, Diagnosis and Prognosis*, 1979 (No. 3) Health Care 5, 7.

[3] Physicians' Crisis Committee, *Court Docket Survey* 6-7 (1975).

[4] *See* Birnbaum, *Physicians Counterattack: Liability of Lawyers For Instituting Unjustified Medical Malpractice Actions*, 45 Fordham L. Rev. 1003, 1006 n.20 (1977) [hereinafter cited as *Birnbaum*].

[5] Steves, *A Proposal to Improve the Cost to Benefit Relationships in the Medical Professional Liability Insurance System*, 1975 Duke L.J. 1305, 1314-15 [hereinafter cited as *Steves*].

[6] Epstein, *Medical Malpractice: The Case for Contract*, 1976 Am. Bar Foundation Research Contributions 87 n.1 [hereinafter cited as *Epstein*].

quency of medical malpractice claims has been increasing at an annual rate of 12.1 percent. *See* National Center for Health Statistics, U.S. Dep't of Health, Education, and Welfare, *Medical Malpractice Closed Claim Study—1976*, at 4-1 (1978) [hereinafter cited as *HEW 1976 Closed Claim Study*].

As a result of this tremendous surge in the number of medical malpractice actions filed each year,[7] the likelihood that a physician will be sued for malpractice at least once during his or her career has become very substantial.[8] Thus, in Northern California alone, the annual number of claims *per 100 physicians* increased from 11.8 in 1968 to 21 in 1972 to 25 in 1974. In Southern California the number of such claims increased from 13.5 per 100 physicians in 1968 to 16.5 in 1973 and 26 in

[7] For additional statistical evidence concerning the frequency with which medical malpractice actions are being filed, *see Steves, supra* note 5, at 1313-15; Roddis and Stewart, *The Insurance of Medical Losses*, 1975 Duke L.J. 1281, 1296-97 ("nine out of 100 doctors had claims made against them in 1963, twenty out of 100 in 1970, perhaps thirty out of 100 today") [hereinafter cited as *Roddis*]; Birnbaum, *supra* note 4, at 1003-14 ["dramatic increase in the frequency of medical malpractice actions"]; *Epstein, supra* note 6, at 87-88 n.1; Wiske, *A Study of Medical Malpractice Insurance: Maintaining Rates and Availability*, 9 Ind. L. Rev. 594, 603 n.50 (1976) [hereinafter cited as *Wiske*]; Adler, *Malicious Prosecution Suits As Counterbalance to Medical Malpractice Suits*, 21 Cleve. St. L. Rev. 51 (1972) [hereinafter cited as *Adler*]; Rathnau, *The Illinois Medical Malpractice Acts: Response to Crisis*, 65 Ill. Bar J. 716, 718 (1977); U.S. Dep't of Health, Education, and Welfare, *Medical Malpractice Report of the Secretary's Commission on Medical Malpractice* 6 (1973) (malpractice claims "increasing steadily") [hereinafter cited as *HEW 1973 Report*; Appendix separately cited as *HEW 1973 Report (App.)*]; Gray, *The Insurer's Dilemma*, 51 Ind. L.J. 120, 121-22 (1975) (ten percent increase in medical malpractice cases each year).

[8] In fact, according to some predictions, every practicing physician can now expect to be sued at least once in his or her lifetime. Brook, Brutoco and Williams, *The Relationship Between Medical Malpractice and Quality of Care*, 1975 Duke L.J. 1197, 1206 [hereinafter cited as *Brook*].

1974.[9] In Virginia, where the claims per 100 doctors was only 2.6 in 1969, the number had risen to 7.2 per 100 doctors by 1975.[10] In certain high-risk specialties, such as surgery, anesthesiology, and obstetrics-gynecology, the chance that a physician will be sued is even greater.[11]

Given the lack of current data, it is somewhat difficult to determine whether the tremendous increases in the number of medical malpractice actions filed in the early and mid-1970's have continued during the past few years. While there are some indications that these spiraling increases may be moderating, the problem remains quite severe. In Cook County, Illinois, for example, unpublished data available to Amici show that although there was a decline in medical malpractice suits during 1976 and 1977, the number of suits increased during 1978 and the rate for the first quarter of 1979 actually exceeded the rate for the same period during the year 1975 when a record number of suits were filed. Likewise, the St. Paul Company reported that new claims per 100 physicians in 1978 increased 12 percent over 1977. *Malpractice Lifeline*, July 30, 1979, at 5. The American Medical Association has reported that while the claims

[9] Keene, *California's Medical Malpractice Crisis*, A Legislator's Guide to the Medical Malpractice Issue 27 (1976) [hereinafter cited as *Keene*].

St. Paul Fire and Marine Insurance Company, a leading medical malpractice insurer, reported a pending claim for one in every ten insured doctors in 1975, as contrasted with one claim for each 23 insured doctors in 1969. *See* St. Paul Fire and Marine Insurance Company, *An Insurance Company's View of the Malpractice Situation*, 103 Medical Times 65 (1975) [hereinafter cited as *St. Paul*].

[10] *See* Aldrich, *Alternatives to the Medical Malpractice Phenomenon: Damage Limitations, Malpractice Review Panels and Countersuits*, 34 Wash. & Lee L. Rev. 1179 n.1 (1977) [hereinafter cited as *Aldrich*], citing State Corporation Commission, *Medical Malpractice Insurance in Virginia: The Scope and Severity of the Problem and Alternative Solutions* 19 (1975).

[11] *See, e.g., Brook, supra* note 8, at 1206 n.47; *HEW 1973 Report (App.), supra* note 7, at 16-17; *St. Paul, supra* note 9, at 66.

frequency per 100 physicians declined during 1976, the frequency increased in 1977.[12] Moreover, a 1977 report found that malpractice claims had risen by nearly 50 percent since 1972.[13]

Thus, the evidence clearly shows that medical malpractice actions are being filed in numbers that were unheard of before the crisis of the mid-1970's.

B. A Significant Number of These Claims Are Entirely Baseless and Brought with an Improper Motive.

Although it is difficult to state with precision what percentage of medical malpractice claims are unjustifiably

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[12] American Medical Association, *State By State Report on Professional Liability Insurance in the United States* (Nov. 1978) [hereinafter cited as *AMA 1978 Report*].

[13] Schwartz and Komesar, *Doctors, Damages and Deterrence: An Economic View of Medical Malpractice*, 298 New Eng. J. of Med. 1282, 1286 (1978).

While a number of explanations have been offered for the dramatic increase in the number of medical malpractice actions in the past ten years, almost always included are: the increase in insurance and greater public awareness of insurance; publicity about malpractice awards; and the costs and delays of litigation forcing insurance companies to settle "nuisance" suits. *See, e.g., Birnbaum, supra* note 4, at 1007-08; *Aldrich, supra* note 10, at 1179-81; *Wiske, supra* note 7, at 595; *St. Paul, supra* note 9, at 67-76; Wessler, *The Role of Custom in Medical Malpractice Litigation*, 1975 B.U.L. Rev. 647, 660 [hereinafter cited as *Wessler*]; Wallach, *Medical Malpractice: A Professional Dilemma For the Lawyer*, J. Legal Med. 40, 41 (July/Aug. 1974); *HEW 1973 Report, supra* note 7, at 2-3, 24-5; Mechanic, *Some Social Aspects of the Medical Malpractice Dilemma*, 1975 Duke L.J. 1179, 1181-86 [hereinafter cited as *Mechanic*]; *Roddis, supra* note 7, at 1297-1300; Annas, Katz and Trakimas, *Medical Malpractice Litigation Under National Health Insurance: Essential or Expendable*, 1975 Duke L.J. 1335, 1336-37 n.8; *Kisner, supra* note 2, at 654; Reder, *Medical Malpractice: An Economist's View*, 1976 Am. Bar Foundation Research Contributions 511, 528; Symposium, *Introduction: The Indiana Act in Context*, 51 Ind. L.J. 91, 93 (1975); *Ribicoff Study, supra* note 1, at 1, 3, 16, 447-53; Roth, *The Medical Malpractice Insurance Crisis: Its Causes, The Effects, and Proposed Solutions*, 44 Ins. Counsel J. 469, 470-73 (1977) [hereinafter cited as *Roth*].

instituted, studies show that a very large number of nonmeritorious, and even legally frivolous, malpractice claims are being brought against physicians. For example, the HEW study of claims closed during 1976 showed that only 47 percent of all claims resulted in any payment whatsoever. *HEW 1976 Closed Claim Study, supra* p. 10, at 8-5.[14] This finding is consistent with evidence from HEW's earlier study of claims closed during 1970 where only about 45 percent of all claims resulted in some payment. *HEW 1973 Report, supra* note 7, at 10.[15] More-

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[14] Other studies confirm the findings of the HEW studies. The NAIC malpractice claims study concluded that considering all dispositions the defendant prevailed 62 percent of the time. National Association of Insurance Commissioners, *Malpractice Claims*, Vol. 2, No. 1 at 129 (Dec. 1978) [hereinafter cited as *NAIC Study*]. The 1974 closed claim survey carried out by the Insurance Services Office concluded that 52-53 percent of all claims resulted in no payment to the claimant. *See* Insurance Services Office, Report of the All-Industry Committee, *Special Malpractice Review: 1974 Closed Claim Survey* 17, 41 (Nov. 1976) [hereinafter cited as *1974 Closed Claim Survey*]. The St. Paul Fire and Marine Insurance Company has reported that between 1968 and 1975 the annual percentage of claims closed without payment ranged from 51 percent to 68 percent, averaging over 60 percent nationwide. *See Report of the Interim Task Force on Medical Malpractice*, State of Oregon 126 (1976) [hereinafter cited as *Oregon Task Force*].

[15] *See generally Aldrich, supra* note 10, at 1194 ("Numerous malpractice actions are brought against physicians without justifiable cause."); *Kisner, supra* note 2, at 655 ("Available statistical information suggests that a significant percentage of the malpractice claims filed lacks either a legal or factual basis.").

It should also be noted that HEW's 1973 report includes data showing that approximately 60 percent of the total number of incidents, including pre-claims, resulted in no payment to the claimant. Rudov, Myers & Mirabella, *Medical Malpractice Insurance Claims Closed in 1970*, in *HEW 1973 Report (App.), supra* note 7, at 14 (Table 2).

In addition, the 1973 report contains evidence showing that lawyers accepted only 12 percent of the medical malpractice cases brought to them and that the most common reason for rejecting a case (41 percent of the time) was "no perceived liability." Dietz, Baird, and Berul, *The Medical Malpractice Legal System*, in *HEW*

over, the number of nonmeritorious claims is undoubtedly much larger than the number of cases in which no payment is made, because many cases are settled in order to avoid the cost of litigating the claims. *See* pp. 15-17, *infra*.

Although the studies referred to above made no attempt to determine how many of these nonmeritorious claims were entirely baseless and brought for improper reasons, they left little doubt that a significant number of malpractice claims are unjustifiably instituted against physicians.[16] Some such claims are brought solely to harass a physician as a result of the patient's ill will; others are instituted in an attempt to obtain a settlement from the physician's insurer for the "nuisance value" of a claim, since the insurer may find it economically beneficial to settle the action rather than to pay substantial defense costs; and still others are brought in response to a doctor's claim or suit for an unpaid bill. *See Birnbaum, supra* note 4, at 1017-18 and sources cited in note 16, *supra*. Claims brought for any of these reasons—like the suit of Respondents here, which the trial jury found was deliberately brought in a "willful and wanton" manner—do not deserve the protection that is

1973 Report (App.), supra note 7, at 153. Defense lawyers *and* plaintiffs' lawyers estimated that malpractice occurs in only one-third of all malpractice claims. *Id. See also* Curran, *How Lawyers Handle Medical Malpractice Cases: An Analysis of an Important Medicolegal Study* (DHEW Pub. No. HRA 76-3152, 1976) [hereinafter cited as *Curran*].

[16] *See, e.g., Aldrich, supra* note 10, at 1194; Stimson, *Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process as Remedies for Meritless Medical Malpractice Suits*, 45 Cinn. L. Rev. 604, 621-22 (1976) [hereinafter cited as *Stimson*]; *Birnbaum, supra* note 4, at 1008-09, 1017; *Adler, supra* note 7, at 53; Segar, *Is Malpractice Insurable?*, 51 Ind. L.J. 128 (1975) [hereinafter cited as *Segar*]; Blackwell and Talarzyk, *Consumer Attitudes Toward Health Care and Medical Malpractice* 17-18 (1977) (slightly more than half the claims are "nuisance" claims) [hereinafter cited as *Blackwell*].

afforded to a plaintiff who brings a legitimate claim in good faith.

Data concerning the disposition of these claims helps to explain why physicians are vulnerable to suits brought to extort a settlement. Medical malpractice claims take longer to prepare and try than other personal injury cases and, thus, are more costly to defend. *See HEW 1973 Report, supra* note 7, at 42; *Curran, supra* note 15, at 3. HEW's Malpractice Commission found that medical malpractice cases take two to three times longer to try than other personal injury cases because of the complexity of expert medical testimony. *HEW 1973 Report, supra* note 7, at 18. Lawyers surveyed in the HEW study estimated that the typical medical malpractice case requires three-and-a-half to four times the number of attorney hours as do other personal injury cases. *See Curran, supra* note 15, at 18.

The HEW study of claims closed in 1970 found that only half of all malpractice claims are closed within 18 months after the file is opened, and ten percent remained open 6½ years after the file is opened. *HEW 1973 Report, supra* note 7, at 11. The 1974 closed claim survey found the average time between the incident date and settlement to be 31 months. *1974 Closed Claim Survey, supra* note 14, at 13. The NAIC study found the average time from incident to disposition to be 37 months. *NAIC Study, supra* note 14, at 17.[17]

Thus, medical malpractice actions are more costly to prosecute and defend than other personal injury cases. *See, e.g., HEW 1973 Report, supra* note 7, at 35, 89. Data recently complied by A. M. Best Company show that in medical malpractice actions loss adjustment ex-

[17] *See also HEW 1976 Closed Claim Study, supra* p. 10, at 3-4 (reporting a mean processing time of 19.4 months from filing of the claim to final disposition); *Ribicoff Study, supra* note 1, at 8-9.

penses (legal defense, investigation and unallocated expenses) are much higher in comparison to total indemnity payments than is the case in other liability actions. The ratio of loss adjustment expenses to indemnity losses averages .446 for the medical malpractice line, as compared to .174 for private passenger automobile liability, and .373 for other liability lines.[18] In a report complied by actuarial consultants to the Illinois State Medical Inter-Insurance Exchange for an official filing with the Illinois Department of Insurance for the 1979-80 policy year, it was recently estimated that the average claims expense (legal defense costs) is now $6,086 per claim. Milliman & Robertson, Inc., *Report to the Illinois State Medical Inter-Insurance Exchange* Exh. 31 (April 4, 1979). These higher costs are largely due to the need for expensive diagnostic procedures and, as noted above, expert medical testimony. *See Wiske*, *supra* note 7, at 604 n.58; Mallor, *A Cure for the Plaintiff's Ills?*, 51 Ind. L.J. 91, 105 (1975). The Ribicoff subcommittee reported that as much as 55 percent of the money paid by insurance companies for malpractice claims may go to defense attorney and investigation costs. *Ribicoff Study*, *supra* note 1, at 10.[19]

Few malpractice claims proceed to trial, and of those that do, the plaintiff seldom wins. HEW's Malpractice Commission found that fewer than ten percent of all claims are tried. *HEW 1973 Report (App.)*, *supra* note 7, at 13.[20] The 1974 closed claim survey concluded that only seven percent of the claims go to verdict and that

[18] A. M. Best Co., *Best's Aggregates & Averages: Property-Casualty*, 128, 135, 139, 43B, 47B, 49B, 63B, 64B (1978). These ratios were computed by averaging the figures given for each liability line for stock, mutual and reciprocal companies.

[19] Defense costs for cases in which no payment was made represent about 35 percent of total defense costs expended in all cases. *1974 Closed Claim Survey*, *supra* note 14, at 12.

[20] *Accord, Adler*, *supra* note 7, at 52.

the defendant prevails 78 percent of the time. *1974 Closed Claim Survey*, *supra* note 14, at 13. Similarly, the NAIC determined that of all claims resolved by trial, the plaintiff prevailed only nine percent of the time. *NAIC Study*, *supra* note 14, at 4, 129-30.

This evidence shows that when the merits of medical malpractice claims are actually reached and determined, a very small percentage are found to have substance. Nevertheless, because of the time and expense of defending a typical malpractice claim, physicians and their insurers are forced to settle a larger number of nuisance suits and other groundless claims brought to harass or for other improper motives.[21]

II. THE FILING OF FRIVOLOUS MALPRACTICE CLAIMS HAS HAD A DEVASTATING IMPACT ON THE NATION'S HEALTH CARE SYSTEM AND JUDICIAL SYSTEM.

A. There Has Been an Enormous Increase in Medical Malpractice Insurance Premiums Which, in Turn, Has Resulted in Higher Health Care Costs to Patients.

The dramatic increase in the number of medical malpractice actions has caused the cost of medical malpractice insurance to "skyrocket." *Birnbaum*, *supra* note 4, at 1003-04. These tremendous malpractice insurance costs have contributed substantially to the recent rises in patients' health care costs.

The recent increases in medical malpractice insurance premiums are staggering. According to the HEW's 1973 report, premiums for physicians other than surgeons rose 540.8 percent between 1960 and 1970, and for surgeons

[21] *See generally Curran*, *supra* note 15, at 19; *Roth*, *supra* note 13, at 473; *Birnbaum*, *supra* note 4, at 1008-09.

they rose 949.2 percent. *HEW 1973 Report, supra* note 7, at 13.[22]

Notwithstanding these huge increases during the 1960's premiums have increased even more during the present decade. A nationwide survey conducted in early 1975 showed average rate increases in 20 states during 1974 and 1975 ranging from 100 to 600 percent. *American Medical News*, Feb. 24, 1975, at 1. In Ohio, for example, rates for the lowest risk physicians rose 423 percent in October 1974, and for the highest risk category they rose 747 percent. *Id.* at 13. In January 1975 rates in Michigan rose as much as 658 percent. *Id.* at 10.[23] In Illinois, premiums for physicians in the high risk category increased tenfold between 1968 and 1976. *Blackwell, supra* note 17, at 20. Argonaut Insurance increased its premiums 380 percent for 4,000 doctors in Northern California in 1975.[24] *Keene, supra* note 9, at 27. The St. Paul Company reported that its insured doctors would face premium increases in 20 of 29 states in 1979. *Malpractice Lifeline*, July 30, 1979, at 5.

Comprehensive figures concerning the amounts doctors actually pay for malpractice coverage are not readily available. However, some examples from available figures

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[22] In Utah, for example, the rates for the year 1969 were thirteen times what they had been in 1967. *Adler, supra* note 7, at 52.

[23] For a state-by-state breakdown of rates and increases *see American Medical News*, Feb. 24, 1975, at 1.

[24] As explained by one HEW report:

> All across the country in state after state in early 1975 the shock waves hit. The insurance carriers announced either that they were dropping malpractice insurance completely by July 1, or they announced rate increases of from 200 to 600 percent for physicians and even larger increases for hospitals. Some hospitals asked to pay huge increased premiums had never lost a single malpractice case. These increases often followed upon other very sizeable increases granted in the early seventies. [*Curran, supra* note 15, at 34.]

are startling. For example, in New York the proposed 1975 premium for neurosurgeons and orthopedists was $43,000, in contrast with the 1965 premium of $819 and the 1974 premium of $14,000 paid by the same physicians. *Boutin, supra* note 2, at 407. In Southern California, by 1976, according to ISO ratings, coverage with $100,000/$300,000 policy limits was costing certain surgeons $37,066. *Brook, supra* note 8, at 1211 n. 58.[25] Other evidence suggests that some specialists may be paying premiums of more than $60,000 per year for basic coverage,[26] and one calculation for "high-risk" surgeons in California shows a premium of $77,674 a year.[27] According to the 1975 American Medical News survey, those physicians who could not obtain coverage through the Illinois State Medical Society group policy then went to Lloyds of London, which was charging $48,000 a year for claims-made coverage for high-risk physicians. *American Medical News*, Feb. 24, 1975, at 10.[28] As a result of figures like these, there has been serious concern in recent years about the availability of medical malpractice insurance even at exorbitant rates.[29]

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[25] *See also* Redish, *Legislative Response to the Medical Malpractice Criiss: Constitutional Implications* 1-2 (1977).

[26] *See, e.g.*, Hale and Podell, *Medical Malpractice in New York*, 27 Syracuse L. Rev. 657, 783 (1976) [hereinafter cited as *Hale*]; D. Louisall & H. Williams, *Medical Malpractice* 5 (1978 Supp.).

[27] *Steves, supra* note 5, at 1320.

[28] Notwithstanding these tremendously high base figures, physicians who had been sued for malpractice one or more times might also face surcharges ranging from 30 to 50 percent, *without regard to the outcome of the suit.* *See* p. 28, *infra*.

[29] During the mid-70's many insurers withdrew from the medical malpractice field altogether. *See, e.g., Birnbaum, supra* note 4, at 1016; *Wiske, supra* note 7, at 594; *Aldrich, supra* note 10, at 1180 n.4; *Boutin, supra* note 2, at 424-25; *Blackwell, supra* note 16, at 20; *Hale, supra* note 26, at 783; *HEW 1973 Report (App.), supra* note 7, at 495; *Segar, supra* note 16; *Keene, supra* note 9, at 27. Physicians in some states and some specialties were un-

Even where insurance is available, the rapidly escalating premiums[30] have resulted in substantially higher health care costs to the consumer, since it is well established that these premium increases generally are passed on to the patient through higher fees.[31] HEW's Malpractice Commission estimated that a hospitalized patient pays approximately 50 cents each day for the hospital's professional liability insurance, and that patients pay 20 to 50 cents out of every $10.00 fee for their doctor's insurance. *HEW 1973 Report, supra* note 7, at 13. By 1975 the AMA estimated that each visit to a doctor cost the

able to obtain any coverage or had to accept lower policy limits than were sought. *Id.* It has been reported that the number of insurance carriers writing medical malpractice insurance decreased from approximately 85 to five. Redish, *Legislative Response to Malpractice Insurance Crisis: Constitutional Implications*, 55 Texas L. Rev. 759, 760 n.4 (1977) [hereinafter cited as *Redish*]. Although the availability situation may not be as critical at present, some states foresee continuing insurance availability problems. *See Impact*, April 28, 1978, at 7. In fact, one report estimates that 10 percent of California's physicians are "going bare," that is, without any malpractice insurance. *AMA 1978 Report, supra* note 12, at 5. As one state task force studying the medical malpractice problem concluded, "[M]aintaining the availability of an adequate form of insurance protection for physicians in this state is essential to the welfare of [its] citizens * * *." *Oregon Task Force, supra* note 14, at 13.

[30] Even with the advent of physician-owned/medical society created liability insurance companies, premiums are still extremely high. In a report of data collected through the American Medical Assurance Company of 21 such companies in May 1979, annual premiums range as high as $31,360 (NORCAL Mutual), $30,144 (MIEC), $23,856 (SCPIE), $22,292 (New York), $21,400 (Illinois), $18,000 (Michigan), $17,500 (Florida), and $17,400 (New Jersey). *See* American Medical Assurance Company, *Uniform Data Report* (May 1979). In addition, the physicians are required to make a substantial contribution to capital.

[31] *See, e.g., Birnbaum, supra* note 4, at 1016 n.91; *Wiske, supra* note 7, at 595; *Boutin, supra* note 2, at 423; *Wessler, supra* note 13, at 661; *HEW 1973 Report, supra* note 7, at 12 and (*App.*) 552; *Ribicoff Study, supra* note 1, at 2; *Roth, supra* note 13, at 474; *HEW 1976 Closed Claim Study, supra* p. 10, at 1-1, 6-2.

average patient $1.24 for his or her physician's malpractice insurance. *Blackwell, supra* note 16, at 18.[32] In fact, an AMA study indicated that over a two-year period doctors raised their fees 96 cents per visit because of malpractice insurance costs. *Birnbaum, supra* note 4, at 1016 n. 91. When one insurance company announced its proposed increases in December 1974, it was estimated that the increases would have added an additional $50.00 to each patient's bill for an average hospital stay of seven to ten days.[33]

Thus, the huge increase in medical malpractice claims has caused a corresponding jump in malpractice insurance costs, a factor which has contributed substantially to the nation's extremely high health care costs.

B. Nonmeritorious Malpractice Claims Have Other Negative Effects on Our Health Care System.

The enormous increase in medical malpractice claims, a significant portion of which are groundless, and the attendant surge in malpractice premiums, have had a severe impact on our health care system, in addition to the increase in costs to patients discussed above.

First, there is evidence that some physicians have left medical practice altogether because of rising insurance costs. The Ribicoff subcommittee cited reports in its 1969 study that 350 physicians in California had quit medical practice because of the cost of malpractice insurance. *Ribicoff Study, supra* note 1, at 10. In a recent survey of Oregon physicians, 8.8 percent of those re-

[32] *See also Brook, supra* note 8, at 1213 (a physician whose premium increases $5,000 for a given year may increase the fee for each office visit by $1.00); *Boutin, supra* note 2, at 423-24 (as much as five percent of total fee goes to pay doctor's malpractice insurance premiums).

[33] *See* Lombardi, *New York's Medical Malpractice Crisis*, A Legislator's Guide to the Medical Malpractice Issue 44 (1976).

sponding indicated that they had "retired or made definite plans to retire from active practice earlier than [they] had formerly planned" as a result of increased malpractice insurance rates. *Oregon Task Force, supra* note 14, at 198. Similar results have appeared in other recent surveys. *See Impact*, April 28, 1978, at 13; *American Medical News*, Feb. 24, 1975, at 10, 15.

Second, a more widespread consequence of escalating insurance costs is that part-time and semi-retired practitioners frequently are forced to give up their practices, adding to the problem of limited availability of health care services. *See, e.g., Ribicoff Study, supra* note 1, at 10; *Blackwell, supra* note 16, at 19; *Brook, supra* note 8, at 1212; R. Gots, *The Truth About Medical Malpractice* 175 (1975). The 1975 American Medical News survey showed that at least five physicians in Michigan had retired early due to rising insurance costs. *American Medical News*, Feb. 24, 1975, at 11. This development is hardly surprising, since at today's rates premiums alone can exceed a part-time physician's income.

Third, in some instances the high cost of insurance has brought about a physical migration of physicians from geographic areas where premiums are higher. *See, e.g., Redish, supra* note 29, at 760. This was observed in Michigan during the American Medical News survey, where at least eight physicians had left the state for a lower cost area, and in Indiana. *American Medical News*, Feb. 24, 1975, at 10, 11. Obviously, patients in the abandoned areas may be seriously prejudiced by such migration if it occurs in significant numbers. *Redish, supra* note 29, at 760.

A fourth consequence of high insurance costs is that many physicians have left high-risk specialties or have limited their practice by eliminating some services that might place them in a higher-risk insurance category. *See, e.g., Blackwell, supra* note 16, at 18; Symposium,

Introduction: The Indiana Act in Context, 51 Ind. L.J. 91, 93 (1975); *Redish, supra* note 29, at 760. In fact, during the 1978 survey of 1,000 physicians, 21.5 percent responded that in order to cope with rising insurance premiums, they had "limited their practice, and no longer performed procedures that put them into higher risk more costly insurance categories." *Impact*, April 28, 1978, at 13.[34] Thus, more than one physician in five actually altered his or her practice due to rising premiums. To the extent that any shortage of services exists in a given specialty, patients in general are seriously jeopardized. Moreover, given the existing shortage of health care services generally, this development represents a very serious problem.[35]

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[34] *Accord, Oregon Task Force, supra* note 14, at 198, where 17.5 percent of the responding physicians indicated that they had "modified the nature of [their] practice in order to fall within a lower premium rating class."

[35] In the Preamble to the Medical Malpractice Reform Act of 1975 the Florida legislature found as follows:

> WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and
>
> WHEREAS, it is not uncommon to find physicians in high-risk categories paying premiums in excess of $20,000 annually; and
>
> WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and
>
> WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida; and
>
> WHEREAS, the problem has reached crisis proportion in Florida * * *. [Preamble to 1975 Fla. Laws ch. 75-9.]

See also Woods v. Holy Cross Hospital, 591 F.2d 1164, 1174 (5th Cir. 1979) where the court said, "This crisis would cause injury not only to the health care industry but also to the citizenry of Florida; as physicians curtailed their practices, retired, or practiced defensive medicine and other health care providers restricted

These same considerations obviously affect young physicians who are starting into practice, perhaps even more than established physicians. The high cost of malpractice insurance will affect their decisions concerning specialization and geographic location. *See, e.g., Ribicoff Study, supra* note 1, at 9; *Blackwell, supra* note 16, at 18, 19; Symposium, *Introduction: The Indiana Act in Context*, 51 Ind. L.J. 91, 92 (1975).[36]

Finally, another result of the tremendous increase in medical malpractice suits has been the practice by physicians of "defensive medicine," [37] which adds to the overall cost of health care and results in the misallocation

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their services both the quantity and quality of health care in Florida would diminish."

In December 1974 a hospital in Indiana announced that it was discontinuing all elective surgery because its anesthesiologists were unable to renew their insurance policies. Only through intervention of the state insurance commisisoner were the anesthesiologists able to obtain coverage for a trial period pending developments in the state legislature, at rate increases of 500 to 600 percent. Stewart, *The Malpractice Problem—Its Cause and Cure: The Physician's Perspective*, 51 Ind. L.J. 134, 137 (1975) [hereinafter cited as *Stewart*].

See also Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250, 1265 (1977) (Ryan, J., dissenting): "In some states the so-called malpractice crisis has resulted in the closing of hospital emergency services, the withdrawal of insurance writers from the field, and the abandonment by some physicians of their chosen specialties."

[36] For example, in San Francisco a group of pediatricians hired a young anesthesiologist who was just entering practice at a salary of $42,000 a year. When he attempted to obtain liability insurance, most companies were not interested, but one was willing to write a policy for $32,000 a year, 75 percent of his income before taxes. *Stewart, supra* note 35, at 137.

[37] HEW's Commission defined defensive medicine as "the alteration of modes of medical practice, induced by the threat of liability, for the principal purposes of forestalling the possibility of lawsuits by patients as well as providing a good legal defense in the event such lawsuits are instituted." *HEW 1973 Report, supra* note 7, at 14.

of health care resources.[38] Defensive medicine may occur in several forms. A physician may perform a procedure "which is not medically justified but is carried out primarily (if not solely) to prevent or defend against the threat of medical-legal liability." *Id.* A doctor may decide not to perform a given procedure because of fear of a later malpractice suit, even though the procedure may be justified. *Id.* HEW's Commission also noted a third form of defensive medicine, namely, a reluctance on the part of physicians to publish case reports in medical journals describing adverse effects of diagnostic and therapeutic procedures. *Id.* Obviously, each of these forms of defensive medicine has a very serious negative impact on the provision of proper health care services.

Available evidence indicates that the practice of defensive medicine, due to the threat of malpractice liability, is widespread. In the Ribicoff study it was noted that "the specter of malpractice litigation" has caused physicians to be "overly cautious" in many areas. *Ribicoff Study, supra* note 1, at 22.

> For example, it has become commonplace for physicians to order complete x-ray studies of an injured limb even without the slightest indication of a fracture. Needless to say, these x-rays can add $20 to $30 to the patient's bill even though they may be unwarranted in 99 out of 100 cases. [*Id.*]

HEW's Commission in 1973 noted that nearly every physician who had testified before it cited the practice of defensive medicine as a harmful result of the increasing number of malpractice suits. *HEW 1973 Report, supra* note 7, at 14. The Commission also cited surveys of physicians which found that 50 to 70 percent of those surveyed practiced defensive medicine because of the

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[38] HEW's Commisison has termed defensive medicine "one of the most pervasive impacts of the medical malpractice problem * * *." *HEW 1973 Report, supra* note 7, at 14.

threat of being sued. *Id.*, Bernzweig, *Defensive Medicine*, in *HEW 1973 Report (App.)*, *supra* note 7, at 38, 39. In a recent survey of Oregon physicians, 88.1 percent indicated that they do practice defensive medicine, including 73.8 percent who use more X-rays and 70.5 percent who use more laboratory tests. *Oregon Task Force*, *supra* note 14, at 201.[39]

Not only does defensive medicine inflate the cost of health care, but it has resulted in misallocation of scarce medical resources. *See, e.g., HEW 1973 Report (App.)*, *supra* note 7, at 40; *Roth*, *supra* note 13, at 474. *See generally*, Project, *The Medical Malpractice Threat: A Study of Defensive Medicine*, 1971 Duke L.J. 939, 943:

> Utilizing the physician's time and hospital facilities for defensive medicine reduces the quantity of care available for legitimate health needs, and, at a time when the demand and need for health care exceeds its supply, any such misallocation of resources is of crucial significance.[40]

[39] Another recent survey also found that more than 80 percent of the participating physicians had changed their method of practice because of concern over legal liability. The same survey indicated that 48 percent were ordering extra diagnostic tests because of fear of malpractice litigation. *See Wessler, supra* note 13, at 659.

A comprehensive survey of the practices of Texas physicians resulted in findings that because of the wave of malpractice claims: (1) 67 percent were ordering more x-rays; (2) 66 percent were ordering more lab tests; (3) 51 percent made greater use of a second physician's opinion; (4) 50 percent were delegating less responsibility for the patient's care; and (5) 48 percent were hospitalizing their patient more often. *See Blackwell, supra* note 16, at 18.

Since 1969 the number of all in-patient laboratory tests has been increasing at a rate of 7-18 percent annually per patient, and x-ray tests alone have been increasing at the rate of four to twelve percent per patient annually. *See Roth, supra* note 13, at 474. This in all probability is additional evidence of the practice of defensive medicine.

C. The Filing of Even a Frivolous Malpractice Claim Causes Irreparable Harm to the Defendant Physician.

Not surprisingly, the most obvious and immediate negative effects from the recent increases in malpractice claims fall upon defendant physicians themselves, like Petitioner in the instant case. What is especially troubling and surprising about this otherwise expected result is that these physicians are likely to suffer most of the same harms whether or not they are ultimately vindicated. In fact, even the most frivolous claim, brought simply to harass the physician, is likely to cause most of the same negative consequences that occur in the case of a meritorious claim.

The mere filing of a malpractice claim generates adverse publicity, causing harm to the physician's reputation, which results directly in a loss of patients and income. *See, e.g., Birnbaum, supra* note 4, at 1015. The physician's reputation is of paramount importance for most people in choosing a doctor. *See generally Blackwell, supra* note 17, at 30 (Table 3-4). In fact, a comprehensive study of consumer attitudes on health care showed that 49 percent of the people surveyed considered it important to know whether a doctor had ever been sued for malpractice (without regard to outcome), including 33.5 percent who felt it was "very important." On the other hand, only 24.5 percent felt that whether the physician had been sued was unimportant. *Id.* at 31 (Table 3-5). If one half of the population considers the

[40] Although it is sometimes asserted that physicians practice "better" medicine because of the fear of malpractice suits, Eli Bernzweig, who was the Executive Director of the HEW Commission on Malpractice, has concluded that "there undoubtedly are more who practice worse medicine because of this fear." *Segar, supra* note 16, at 129 (citation omitted).

mere filing of a claim against the doctor to be an important consideration in choosing a doctor, obviously such claims, whether totally unfounded or not, will have a direct impact on the doctor's number of patients and income.

Another economic consequence which flows directly from the mere filing of a claim against the physician and from the filing of a large number of frivolous claims is the enormous increase in the cost of medical malpractice insurance, as discussed above. In many cases physicians' premiums will increase as a result of the mere filing of suits against them, without regard to outcome.[41] For example, a 1975 survey of insurance rates revealed that one company, which was the largest insurer in several states, was adding surcharges in several states of thirty percent for any doctor who had been sued once in the past three years and fifty percent if he or she had been sued twice, without regard to the outcome of the suit. *American Medical News*, February 24, 1975, at 10. Moreover, these surcharges would automatically continue in effect for three policy years, even if the suit were resolved in the physician's favor during that time. With base premiums alone often amounting to tens of thousands of dollars, *see* pp. 18-20, *supra*, surcharges of thirty to fifty percent are a serious problem for any physician.[42]

[41] *See, e.g., Birnbaum, supra* note 4, at 1015 ("Even if the physician is ultimately successful in defending the malpractice action, he may still sustain a substantial economic loss, since his insurance premiums may be increased or his insurance may be cancelled altogether"). *See also Curran, supra* note 15, at 34 (during 1975 hospitals which had never lost a single malpractice claim were required to pay huge increases in their insurance rates).

[42] While the medical profession's regular insurance premium costs generally are passed on to patients in the form of higher fees, *see* pp. 20-21, *supra*, individual doctors faced with stiff surcharges on their premiums due to malpractice claims may be prevented by competitive factors from recovering such extraordinary costs which other local doctors may not face.

Another example of the consequences which result without regard to the outcome of the suit is the reporting requirements which have been enacted in several states. *See Birnbaum, supra* note 4, at 1014 n.75. For example, in New York every medical malpractice insurer must file a report with the state of all claims for medical malpractice made against any of its insureds. N.Y. Ins. Law § 335 (McKinney 1978). Illinois law, *see* Ch. 73 Ill. Rev. Stats. § 767.19, requires that all suits alleging liability on the part of any physician for medically related injuries shall be reported to the Director of Insurance. The Director is required to maintain complete records of all claims and report that information to the appropriate disciplinary and licensing agencies.[43]

Another direct economic consequence of the filing of even a totally frivolous suit against a physician is the substantial commitment of time and energy required to prepare and present a defense. A physician must take this factor into account in determining whether to agree to the settlement of a nuisance claim.[44] Attendance throughout several days or weeks of trial can result in a substantial loss of income to the physician.

The economic consequences of being sued, although severe, are often not the most serious consequences which the defendant physician faces. *See, e.g., Birnbaum, supra* note 4, at 1015. The mental anguish and uncertainty which many physicians experience may be the most difficult aspect to deal with. Moreover, the disruptive effect while the claim lingers in the courts may prevent the

[43] When a physician reports a claim to the Illinois State Medical Inter-Insurance Exchange, the claim is reviewed by a physician review panel and "points" are assessed against the insured physician. According to data compiled by Amicus Illinois State Medical Society, for the policy year July 1, 1978 to June 30, 1979 a total of 269 claims were reviewed by the panel of experts, and approximately 80 percent of them were found to be nonmeritorious.

[44] *See, e.g., Med. Econ.*, Aug. 21, 1978, at 154.

physician from resuming a normal practice. *See Mechanic, supra* note 13, at 1180:

> Perhaps the most troublesome aspect of having a malpractice claim made against a physician is the anxiety, lost time, and uncertainty that may be involved. Even when such claims are rejected, and physicians vindicated, being sued is an unpleasant and disruptive experience. Thus, the cost to the physician must be weighed not only in terms of the awards actually made, but in terms of the total costs of becoming entangled in such an incident. A claim made against a conscientious physician may cause him considerable suffering and may distract him from his best efforts.

This mental anguish and disruption provide a strong incentive for the physician to want to resolve the entire matter as quickly as possible, even at the cost of compromising a frivolous claim.

Finally, all of the negative effects of the volume of nonmeritorious malpractice claims on the health care system discussed above also have a direct and immediate impact on the defendant physician. Obviously, the physician who is forced to quit medical practice altogether, or to give up a part-time practice, has suffered an irreparable harm. Likewise, a physician who is forced to leave a chosen geographic area or medical specialty has also suffered extreme harm. The same can be said of each of the one in five physicians who has had to limit his or her practice due to the medical malpractice problem. Thus, the physician who is sued for medical malpractice, albeit without any merit and for improper reasons, suffers severe and irreparable injury.

D. The Filing of Frivolous Malpractice Claims Has Hindered the Fair Administration of Justice.

In addition to the medical-related impacts described above, the filing of large numbers of frivolous medical malpractice claims has contributed significantly to the

very serious problem of congestion in the state and federal courts which, in turn, severely impacts on the administration of justice.

In 1973, even before malpractice suits were being filed at their present rate, HEW's Malpractice Commission found:

> Medical malpractice cases are among the most difficult to try. They usually take two to three times longer than other personal injury cases because of the complexity of the requisite expert medical testimony. Thus, although few in total number, they contribute significantly to the congestion and overload of the court system. [*HEW 1973 Report, supra* note 7, at 18.]

With medical malpractice suits now being filed at a rate of approximately 20,000 new cases each year, it is logical to conclude that medical malpractice suits are now contributing an even greater proportion to the problem of congestion in the courts.[45]

Among the principal causes for public dissatisfaction with the courts is that the public perceives the courts as being too crowded, too slow and too expensive.[46] A recent national survey of attitudes toward state and local courts revealed that 62 percent of the people who had had any

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[45] *See Birnbaum, supra* note 4, at 1016 ("Increased numbers of malpractice claims add to court congestion and adversely affect already overburdened court personnel and facilities. Wrongfully instituted malpractice actions which would be vigorously defended, of course, exacerbate this condition").

[46] In 1906 when Roscoe Pound spoke of the causes of dissatisfaction with the administration of justice, the "uncertainty, delay and expense" of litigation were cited as major causes creating "a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community." R. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice, reprinted in* 35 F.R.D. 273, 284 (1964). Those concerns are certainly no less pressing today and have even more impact on physicians than on businessmen.

experience with a state court viewed efficiency in the courts as a "serious" or "very serious" problem. National Center for State Courts, *The Public Image of Courts* 19 (Table II.1) (1978). When those who saw the problem as being "moderately serious" are added, the total increases to 88 percent. *Id.* Only 3 percent of the people surveyed viewed efficiency in the courts as not being a problem. *Id.*

The caseload statistics for the federal courts demonstrate that their dockets too are becoming increasingly overburdened. For example, the most recent report of the Director of the Administrative Office of the United States Courts shows that civil filings in federal district courts have increased 59 percent since 1970. Administrative Office of the United States Courts, *Annual Report of the Director* 104 (1978). The year-end caseload of the Courts of Appeals was 89 percent higher than the comparable figure for 1970. *Id.* at 102.[47]

The delay in the courts means more than that many cases are taking longer to be heard. Delays directly affect the just resolution of disputes. As one federal judge recently explained:

> Achievement of justice, of course, is rendered absolutely impossible by delay. Witnesses will move away, documents will be lost, memories will fade, and the adage that justice delayed is justice denied is absolutely true. Justice is impossible if you do not reach these cases promptly and try them expeditiously. [King, *Management of Civil Case Flow from Filing to Disposition*, 75 F.R.D. 155 (1978).]

Speaking at the second Pound Conference in 1976, Mr. Chief Justice Burger noted, "Inefficient courts cause de-

[47] It is interesting to note that from 1940 to 1970, the number of personal injury cases multiplied five times, and in 1977 alone, the number increased 7.3 percent over 1976. Wallace, *Our Judicial System Needs Help: A Few Inside Thoughts*, 12 U.S.F.L. Rev. 3, 9 n.31 (1977).

lay and expense, and diminish the value of the judgment. * * * Inefficiency drains the value of even a just result either by delay or excessive cost, or both." Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 92 (1976).[48]

Thus, frivolous malpractice claims not only waste the time of overburdened courts, but they prevent the courts from justly resolving legitimate claims.

III. ALTHOUGH PHYSICIAN COUNTERSUITS FOR MALICIOUS PROSECUTION CAN SERVE THE IMPORTANT PURPOSES OF DETERRING FRIVOLOUS MALPRACTICE CLAIMS AND COMPENSATING INJURED PHYSICIANS, THE LOWER COURT'S RULING EFFECTIVELY ELIMINATES ANY SUCH CAUSE OF ACTION.

A. The Lower Court's Ruling Effectively Cuts Off the Physician's Only Recourse Against Frivolous and Bad Faith Claims.

In view of the serious injury that physicians suffer from the filing of even frivolous malpractice claims against them, the courts have a duty to protect unjustly accused physicians from groundless and bad-faith claims. The lower court's ruling in the instant case, however, effectively denies recourse to any physician against totally frivolous claims brought solely for willful and wanton purposes. The jury specifically found that the original suit was filed willfully and wantonly without any prob-

[48] The problem of suits brought for unjustifiable reasons, even by the United States Government, has reached a point where Congress itself may intercede. On July 31, 1979 the Senate passed a bill (S.265) which provides for the award of attorneys' fees and other costs to a prevailing party (limited to individuals with net assets of less than $1 million and corporations with net assets of less than $5 million) in civil actions brought by or against the United States, unless the court finds that the position of the United States was "substantially justified."

able cause. Nevertheless, under the Illinois appellate court's ruling requiring "special damages," it is simply inconceivable that Petitioner and others like him could ever prevail on a cause of action for malicious prosecution.

In its opinion the appellate court listed as one element of a cause of action for malicious prosecution "special damages," meaning, under Illinois law, damages "not necessarily resulting in any and all suits prosecuted to recover for like causes of action." Pet. at 6a. For Petitioner, this meant, according to the court, that he would have to show "damages suffered specially by [him] as distinct from other physicians who have been defendants in malpractice suits." *Id.* Thus, no matter how real and substantial the injury suffered by the unjustly accused physician may be, unless the nature of the damage suffered is peculiar to him alone, as distinct from the types of damage suffered by most other defendant physicians, he has no remedy against the bad-faith litigant. Applying this rule, the court refused to consider as special damages Petitioner's claims that (1) his professional reputation had been injured; (2) he had suffered mental anguish; and (3) he had been forced to spend time and resources on the defense of a frivolous case. The court called these items "so patently common to all litigation that no discussion is warranted." *Id.* In addition, with respect to Petitioner's claim that he would be unjustly required to pay increased insurance premiums due to Respondents' groundless action, the court viewed that claim as "an item necessarily incident to all malpractice cases and not therefore amounting to damages suffered specially" by Petitioner as distinct from other defendant physicians who are subject to frivolous malpractice claims. *Id.*

It may well be true that all of the harms described herein are suffered by nearly every physician who is the victim of a frivolous and bad faith malpractice lawsuit.

That fact does not make a remedy any less necessary or the absence of one any more supportable; indeed, it simply demonstrates the broad need for such relief. It is difficult to conceive of circumstances in today's society under which a physician would suffer special damages of the kind the Illinois courts have required—namely, arrest of the physician or seizure of the physician's property. *See Birnbaum, supra* note 4, at 1022-23 n.120. It is this fact which has led the commentators to agree that in the minority of jurisdictions, like Illinois,[49] which require strict proof of "special damages," "the physician's ability to assert a cause of action for malicious prosecution is illusory;"[50] "a suit for malicious prosecution against a defendant who had brought an unfounded suit for medical malpractice would be barred;"[51] and these "jurisdictions have continued to withhold the remedy" through the arbitrary special damages requirement.[52] It is uniformly recognized that physicians who are unjustly sued in those jurisdictions are totally without any remedy, no matter how frivolous the claims against them and no matter how serious the injuries suffered by them.[53]

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[49] The Restatement of Torts adopts the majority rule and evidences recognition of the harms which physicians suffer by allowing for recovery of, *inter alia*, harm to reputation, expense of defending the original suit, any pecuniary loss arising out of the suit, and emotional distress. *Restatement (Second) of Torts* § 681 (1977).

[50] *Birnbaum, supra* note 4, at 1022-23 n.120.

[51] *Adler, supra* note 7, at 55.

[52] *Kisner, supra* note 2, at 678.

[53] Not only physicians, but all persons against whom frivolous and malicious suits are brought, are left without any remedy in jurisdictions which impose the arbitrary special damages requirement. For example, evidence presented by Petitioner based on a study of reported decisions shows that since 1848, in Illinois, plaintiffs in malicious prosecution actions have prevailed only eight times where the underlying suit was a civil action. *See* Pet. at 24-25.

We submit that the courts in jurisdictions which purport to require "special damages," but which in fact have eliminated all recovery, have totally neglected their duty to protect the unjustly accused physician. Deterrence of spurious suits is only one of the values served by malicious prosecution actions. *See Kisner, supra* note 2, at 661-662 (footnote omitted):

> The assertion that the value of malicious prosecution actions lies only in their possible deterrent effects on the institution of spurious suits disregards the need to protect and compensate those maligned by a misuse of the legal process. The value that has been placed on the right to bring a cause of action must be considered in light of both the interest of the "peaceful citizen" to be free from vexation, damage and possible ruin, and the interest of the courts in promoting the honest use of the judicial process * * *. The paramount value of the malicious prosecution action is thus the protection it affords to every individual.

Petitioner and other physicians have suffered very real and substantial damages as a result of having to defend groundless and bad-faith lawsuits. Their right to be free from such injury, which has been ignored by several states, including Illinois, is a matter of such magnitude as to deserve the concerned attention of this Court.[54]

[54] It should be noted that during 1975 and the next few years most States enacted legislation designed to alleviate some of the problems connected with the medical malpractice crisis. For a summary of these reforms, see National Conference of State Legislatures, *A Legislator's Guide to the Medical Malpractice Issue*, (1976); Comment, *Recent Medical Malpractice Legislation—A First Checklist*, 50 Tul. L. Rev. 655 (1976); *Redish, supra* note 29; *Blackwell, supra* note 16, at 21-22; *NAIC Study, supra* note 14, at 3; *Epstein, supra* note 6, at 128-49; Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Insurance Crisis*, 1975 Duke L.J. 1417. The constitutionality of many of these reforms is still being tested in the courts. *See, e.g.*, Hines v. Elkhart General Hospital, 465 F. Supp. 421 (N.D. Ind. 1979). Although many of the reforms do help physicians by limiting their liability directly or indirectly, or by making it more difficult for the plaintiff to recover, none of the reforms provides any assistance to the physician who has already been injured by a frivolous and bad faith lawsuit. Only a viable cause of action for malicious prosecution can serve that function.

Since the special injury requirement imposed by the court below effectively bars malicious prosecution suits, "[i]t is essential that those states still that adhere to the minority position, requiring proof of special injury in malicious prosecution actions, abrogate this restrictive rule." *Birnbaum, supra* note 4, at 1090. Only by abandoning the special damages requirement can the cause of action "work as an effective means to counter the increase in medical malpractice actions" [55] and serve to compensate the physician who suffers substantial harm from the filing of a purely frivolous suit.

B. The Legitimate Policy of Encouraging Free Access to the Courts Does Not Encompass Frivolous Claims Brought To Extort Nuisance Settlements or To Harass Physicians.

In order to avoid contributing to the very serious problems discussed in Section II, above, the courts can and must distinguish between frivolous, bad-faith claims, such as the original suit against the Petitioner here, and legitimate claims brought with a proper purpose. In purporting to rest its decision on a policy of encouraging free access to the courts, the court below ignored this vital distinction.

Legitimate claims brought in good faith by a litigant, whether or not ultimately successful, warrant the full protection of the courts. Dismissal of such claims, with costs of the action, are the only sanctions that the litigant should suffer. However, claims brought to harass a physician as part of a personal vendetta and claims brought to extort a nuisance settlement from the physi-

[55] *Adler, supra* note 7, at 57.

cian or his or her insurer deserve none of the protections afforded to legitimate claims brought in good faith. In the instant case, the jury found that Respondents willfully and wantonly and without probable cause filed a medical malpractice claim against Petitioner. The policy of encouraging free access to the courts does not require protection of such claims.

Instead, the courts have a duty to see that the backlogs created by groundless claims do not prevent a fair hearing of legitimate claims. This point was forcefully made by the United States Court of Appeals for the District of Columbia Circuit in its recent opinion in *Copeland* v. *Martinez*, No. 77-2059, 2060 (D.C. Cir., July 24, 1979), where it held that individuals who in bad faith bring baseless suits against the federal government alleging sex or race discrimination may be liable to the government for its attorneys' fees. The court said that "[l]itigation brought merely to harass is a wholly unredeemed burden and an affront to the judiciary" [56] and noted that the court has "no intention of sanctioning bad faith in judicial proceedings * * *." [57] If the courts fail to exercise this control over bad faith claims, the court noted:

> Sufficient abuse of the judicial process could overwhelm the courts and destroy the judicial system as an effective branch of government. This, and any discernible degree thereof, such as the bad faith litigation found here, the courts have a constitutional duty to prevent. [Slip op. at 22 n. 69.]

Accord, *Birnbaum*, *supra* note 4, at 1017 ("Some actions clearly are unjustifiably instituted and must be vigorously discouraged by both the bench and the bar," including

[56] Slip op. at 21.

[57] *Id.* at 22.

actions which are "brought solely to harass a physician as a result of a patient's spite, malice or ill will").[58]

Claims brought simply to extort settlements from physicians or their insurers are similarly unworthy of any protection by the courts. Mr. Chief Justice Burger, writing for this Court in its recent opinion in *Reiter* v. *Sonotone Corporation*, 47 U.S.L.W. 4672, 4676 (U.S., June 11, 1979), noted that "[d]istrict courts must be especially alert to identify frivolous claims brought to extort nuisance settlements * * *." In *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), Mr. Justice Rehnquist, writing for the Court about the field of federal securities laws, said in words equally apropos to the medical malpractice situation that "a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." 421 U.S. at 740. For all of the reasons described above, physicians are particularly vulnerable to suits brought to extort nuisance settlements. The courts have a duty to protect the physicians, and the court system itself, against these groundless and unjustifiably instituted claims.

Suits brought to extort a settlement are particularly pernicious because they not only are a result of the current crisis in the courts, but also are a cause of further

[58] *See also* Nemeroff v. Abelson, 469 F. Supp. 630 (S.D.N.Y. 1979) (where the court awarded defendants $50,000 in attorneys' fees and costs to be taxed against plaintiff *and* his counsel, following a stipulation of dismissal with prejudice of an action which was instituted "in bad faith, vexatiously, wantonly or for oppressive reasons"); Miracle Mile Associates v. City of Rochester, No. 78-592 (W.D.N.Y. May 18, 1979).

exacerbation of the problem. As the volume of cases increases due to frivolous claims, the delays and backlogs in the courts increase, and it becomes more costly to litigate a claim. As the time and expense of litigation thus increases, insurers feel more pressure to settle claims. This, in turn, encourages people to bring more strike suits, and a vicious circle is created.

The Illinois Appellate Court concluded in its opinion in the instant case that the state's "overriding public policy" of preserving "free and unfettered access to the courts" predominated over the need to protect the courts from "misuse and the physician from the resulting harm." Pet. at 14a. However, the concern for not wanting to discourage legitimate claims is not a reason to afford protection to totally unjustified actions. In *Copeland* v. *Martinez*, *supra*, the District of Columbia Circuit found unpersuasive the plaintiff's similar arguments concerning the "alleged chill on potentially valid litigation." Slip op. at 19. The court said the alleged chill would not occur unless persons with meritorious claims "believed that courts were likely so to mischaracterize those suits as to find them not only without merit, but wholly vexatious as well." *Id.*[59]

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[59] In *Herbert* v. *Lando*, 47 U.S.L.W. 4401 (U.S., April 18, 1979), the respondents made, and lost, an argument directly analogous to the one asserted by Respondents here. The media in that case contended that allowing plaintiffs in libel actions to inquire into the editorial process and the states of mind of those involved in that process would have a chilling effect on the publication of news. This Court responded that

> if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* [v. *Sullivan*, 376 U.S. 254 (1964)] and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. * * * Those who publish defamatory falsehoods with the requisite culpability * * * are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation. * * * If such [direct] proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more than what our cases contemplate * * *. [47 U.S.L.W. at 4405-06.]

And so here, if recoveries such as that awarded by the jury to Petitioner have the effect of discouraging unfounded, frivolous or malicious lawsuits, that result is not only acceptable but laudatory. The plaintiff with a meritorious claim will no more be inhibited from pursuing it in the face of such a recovery than would the publisher in *Herbert* who was confident that his news was true and accurate.

Furthermore, it should be emphasized that the defendant physician, who is severely injured by a groundless lawsuit, like Petitioner here, deserves the protection of the courts through the preservation of a viable remedy. As one commentator has written, "Fearing a denial of access to the courts, the judiciary has neglected its duty to protect the unjustly accused defendant." *Kisner*, *supra* note 2, at 685. The bad-faith litigant does not have any interests that are worthy of the courts' protection, and clearly none that overrides those of the unjustly accused physician.

The courts and juries are fully capable of distinguishing between borderline suits brought in good faith and frivolous claims brought to extort a settlement or to harass physicians. The courts should not place these two kinds of plaintiffs on the same footing. *See Teesdale* v. *Liebschwager*, 42 S.D. 323, 325, 174 N.W. 620 (1919), *cited in* F. Harper and F. James, 1 *The Law of Torts* § 4.8 at 327-28 (1956):

> To hold that statutes, allowing a successful defendant costs, furnish the only indemnity for such defendant, and this whether or [not] there has been a malicious perversion of legal remedies, places the plaintiff who lawfully uses, and the plaintiff who maliciously perverts the right to sue, upon precisely the same footing with respect to the question of

> liability for their respective acts. To thus place one who maliciously perverts the remedies which the law has provided for the good-faith litigant upon the same footing as such good-faith litigant would not only be monstrous and unjust, but fraught with great public evil, in that it would encourage the unscrupulous to use our courts as instruments with which to maliciously injure their fellow men.

Courts should protect the rights of persons with legitimate grievances to bring a lawsuit. At the same time, physicians should not be denied a counter-remedy against those who bring totally unjustified actions. *See Stimson*, *supra* note 16, at 622:

> Patients who bring suit which does not meet the necessary burden of proof but has some basis, should be subjected only to the failure of the cause of action. Those patients, however, who recklessly bring a malpractice action, either without probable cause or with some ulterior motive, should not be afforded the protection given by the judicial process to legitimate actions and should be held liable in a countersuit brought by an injured physician.

The courts are capable of distinguishing between frivolous, bad-faith claims and legitimate, even if non-meritorious, claims which deserve judicial protection. By refusing to consider such a distinction in the instant case, the court below denied Petitioner and all other physicians damaged by frivolous claims the only effective remedy against this abuse. The lower court also failed to consider the other serious impacts on the nation's health care system and on the courts resulting from the increased filing of groundless claims. Thus, the losers as a result of this decision are not only physicians and the court system, but the public whom physicians and the judiciary attempt so vigorously and effectively to serve.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for a Writ of Certiorari previously filed in this case, this Court should grant a Writ of Certiorari and reverse the decision below.

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